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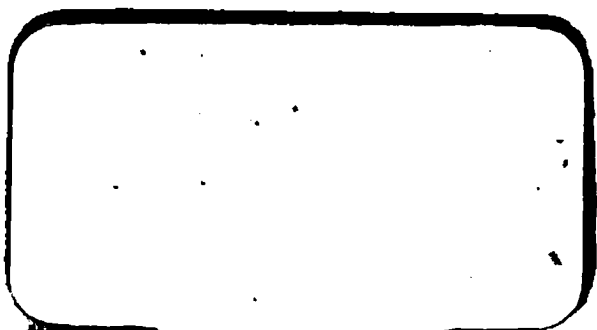
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*v. S.H. 1827.*

THE  
LAW AND PRACTICE  
OF  
**BANKRUPTCY,**

AS ALTERED BY THE NEW ACT,  
(6 GEO. 4. c. 16.)

WITH  
A COLLECTION OF FORMS AND PRECEDENTS  
IN BANKRUPTCY,

AND  
PRACTICAL NOTES.

---

By **EDWARD E. DEACON, Esq.**  
OF THE INNER TEMPLE, BARRISTER AT LAW.

---

IN TWO VOLUMES.

**VOL. I.**

**THE LAW AND PRACTICE OF BANKRUPTCY.**

**LONDON:**

PRINTED BY A. STRAHAN,  
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;  
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1827.



TO  
**SIR NICOLAS CONYNGHAM TINDAL,**

**HIS MAJESTY'S SOLICITOR GENERAL,**

***THIS WORK IS INSCRIBED,***

**AS AN HUMBLE BUT SINCERE TRIBUTE**

**OF ESTEEM AND ADMIRATION**

**FOR THOSE LEGAL TALENTS, AND THOSE PRIVATE VIRTUES,**

**WHICH HAVE GAINED HIM THE UNIVERSAL RESPECT**

**OF HIS PROFESSION,**

**AND HAVE DESERVEDLY RAISED HIM TO**

**THE EMINENT STATION HE OCCUPIES**

**AT THE ENGLISH BAR.**

[illegible]



## PREFACE.

---

SOME apology may be thought due to the profession, in thus offering to their notice a treatise on an important branch of our jurisprudence, which has lately been so ably discussed by Mr. Eden, — and one, too, which (as the framer of the two last statutes relating to bankruptcy) he was so peculiarly well qualified to elucidate. The only excuse that can be made for this presumption is, that great part of the following work was composed before Mr. Eden even announced his intention to publish on bankruptcy; the Author having shortly after the passing of the 5 G. 4. c. 98. (which repealed all the former bankrupt laws) begun to prepare materials for a new treatise on a subject, which he thought the profession would require from some one pen or other. His work was nearly half completed when the 6 G. 4. c. 16. unexpectedly repealed the whole of the preceding statute; and this, together with Mr. Eden's announcement of his book, induced the Author for some time to give up his project in despair. Upon consideration, however, it occurred to him, that the field, although pre-occupied, was

not perhaps entirely engrossed; and that there might still be some room left for a *common* lawyer to glean a few matters useful to the profession, upon a subject involving so many points of commercial law, which had been previously discussed only by gentlemen practising in the Courts of Equity.

The Author is almost ashamed to acknowledge the labour and anxiety it has cost him in his endeavours to justify this attempt, notwithstanding the great assistance he has derived from all those who have trod the path before him; more especially from the works of Mr. Cooke and Mr. Eden, and (though last, not least) from those of his lamented friend, the late Sir William Evans; whose life, if it had been some time longer spared, would have been cheered in its decline by the reflection, that the recent improvements in the bankrupt law have principally sprung from the very able and original suggestions contained in his notes on the former statutes, and in his letter to Sir Samuel Romilly on the necessity of their revision.

In the construction of the following treatise, the Author has collected the law appertaining to the duties of the *Solicitor*, and the important question of *Costs*, into distinct chapters; conceiving that the numerous decisions which have accumulated on each of these subjects, since the first publication of works on bankruptcy, would render such an arrangement more convenient for reference, than

leaving those subjects scattered through different portions of the work. The same plan has been adopted with respect to the functions of the *Messenger*; who, though a less important officer than the solicitor, is one, nevertheless, whose duties draw him into more immediate contact with the property and personal liberty of the bankrupt, and who incurs a heavy responsibility when he oversteps or neglects those duties.

Great pains have been taken in the framing of a copious Index, — without which the very best law book, however instructive to the student, becomes wholly useless in the hurry of reference to the practitioner; and the value of which can only be appreciated by him, who is required on the instant to put his finger on the very page for an authority, to support, or to refute, an objection suddenly raised in court.

With respect to the practical part of the work, the Author cannot omit this opportunity of acknowledging the kind assistance rendered him by John Pensam, Esq., the Secretary of Bankrupts.

The first part of this treatise has swelled to a more bulky volume than the Author contemplated when he began his labours; but if he had pursued the plan of Mr. Cooke, and given the judgments pronounced in the different cases at full length, it would not have been contained in three times its

present size, — so numerous have been the decisions, and so various the new principles established in the law of bankruptcy, since the work of Mr. Cooke was published.

The last number of Messrs. Glyn and Jameson's Reports in Bankruptcy having been published after this work had gone completely through the press, the Author has cancelled several pages, in order to notice in the proper place those judgments which have been reversed upon appeal by the late Lord Chancellor. The other cases are given by way of *Addenda*, and will be found, also, in the general table of the names of cases cited.

With regard to the forms and precedents in bankruptcy, the Author has in this respect adopted the plan of Mr. Cooke, by allotting to them a separate volume; an arrangement which he trusts will be more acceptable, than crowding them as an appendix into the same volume with the text; for one branch of the profession has seldom occasion to refer to them, whilst in the office of the solicitor they are the subjects of frequent reference. The greatest care has been taken to render them correct, and conformable to the provisions of the new statute; and in order to make them more practically useful, they have been principally arranged as forming part of the business of the particular meeting, to which they more immediately belong. Explanatory notes have been also

added to assist the practitioner, as well as notes of reference to that portion of the text in the first volume, which bears upon the subject connected with the precedent.

In the anxiety (which the Author cannot help feeling) of thus appearing before the Public; he will not attempt to crave the indulgence of his readers for any imperfections in the following pages, by the pretence so often urged, "of having been distracted from his undertaking by the labours of an arduous profession;" — being fully impressed with the truth of Dr. Johnson's observation, that no book was ever spared out of tenderness to its author; and least of all can such unreasonable mercy be expected to a defective work of science, or jurisprudence, from a class of men not over celebrated for their blindness to error, or their forbearance to pretension. Whether the writer of this treatise has duly discharged the debt, which Lord Bacon says, every man owes to his Profession, the Profession must alone determine. But whatever the result may be — whether of censure or of praise — it will be some satisfaction to his own mind, to be conscious that he has spared no toil, or effort, to merit its approbation, — and that by industry, at least, he has endeavoured to do well.

Southampton Buildings,

May 1827.

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## INTRODUCTION.

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THE word *Bankrupt*, we are told by Mr. Justice Blackstone (1), is derived from the word *bancus*, or *banque*, which means the table or counter of a tradesman, and *ruptus*, broken, denoting thereby one whose shop or place is broken and gone: whilst Sir Edward Coke (2) somewhat more quaintly, and certainly with greater metaphor, prefers the derivation of it from the two French words *banque* and *route*; which last word, he informs us, means “a sign or mark, as we say a *cart-rout*, which is the sign or mark where the cart hath gone; so, metaphorically, it is taken for him that hath wasted his estate, and removed his *banque*, so as there is left but a mention thereof.” The origin of the word, however, unless it is to gratify the curiosity of the etymologist, does not seem to be very material to the present inquiry, when the meaning of it has been so copiously defined, as well by the numerous decisions of our courts of justice, as by the recent act of the legislature, that forms the subject of the present treatise. Though, if there be a choice to be made between these two learned authors, it must be confessed, that the first derivation appears the more simple and appropriate. It accords, too, with the custom which formerly prevailed among the bankers in the towns of Italy, who used to carry on their business in the public places seated on forms, with benches to count their cash, and of whom if any one became insolvent, his *bench* was broken, either as a mark of infamy, or to put another in its place. (3)

Deriv-  
ation of  
the word.

(1) 2 Comm. 471.

(2) 4 Inst. 277.

(3) Dufresne, 1. 969. Beawes, 322. In favour of Sir Edward

34 & 35  
H. 8. c. 4.

A Bankrupt by our old law was considered in the light merely of a criminal or offender; the 34 & 35 H. 8. c. 4. (which was the first statute passed concerning them) describing Bankrupts as “persons craftily obtaining into their hands great substance of other men’s goods, who suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for *their own pleasure and delicate living*, against all reason, equity, and good conscience.” (1) But now the law of Bankruptcy is considered principally with a view to the benefit of trade, and instead of treating the Bankrupt as a criminal, holds out to him relief and protection against the consequences of his imprudence or misfortune, provided he acts but honestly with his creditors, and gives up all his effects to their use without any fraudulent concealment.

The law of England, says Mr. Justice Blackstone, in this respect has steered between the two extremes of the old Roman, and the civil law; by the former of which the debtor might be either imprisoned in chains, and subjected to stripes and hard labour at the mercy of his creditor, or sold with his wife and children to perpetual foreign slavery *trans Tiberim*; and by the latter (so opposite was the spirit of the two laws), the debtor could not even be compelled

Coke’s derivation, however, it is but fair to remark, that the title of the first English statute relating to the subject (34 & 35 H. 8. c. 4.) was “against such as do make bankrupt,” which is a literal translation of the French idiom, “qui font banque route.”

(1) The original statute that was made against bankruptcy as a crime, (but which does not appear in our statute book,) Sir Edward Coke says (4 Inst. 277.), was against the Lombards, who, after they had made obligations to their creditors, suddenly escaped out of the

realm without having come to any agreement with them. Neither do we find, he adds, any complaint in parliament, or act of parliament made, against any English bankrupt, until the 34 H. 8., “when the English merchant had rioted in three kinds of costlinesses, viz. costly building, costly diet, and costly apparel, accompanied with neglect of his trade and servants, and thereby consumed his wealth.” One would really imagine, that the learned commentator had been describing some transactions in the nineteenth century.

to cede or give up what property he had in his possession, if he would only swear that he had not sufficient left to pay his debts. (1) The law of this country provides equally against the inhumanity of the creditor and the fraud of the debtor, and adopts in a great measure the principle of the law of the *cessio bonorum* introduced by the Christian emperors; whereby, if a debtor ceded or yielded up all his fortune to his creditors, he was secured from being dragged to prison, “*omni quoque corporali cruciatu semoto.*” (2) The protection of the Bankrupt law is, however, only afforded to actual *traders*; who are, in general, the only persons liable to accidental losses, and to an inability of paying their debts without any fault of their own. Trade, (in the words of the learned author of the Commentaries,) cannot be carried on without mutual credit on both sides; the contracting of debts is, therefore, not only justifiable but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother-traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune, and not his fault. To the misfortune, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every trader may be declared a bankrupt, for the benefit of his creditors as well as himself, — it has also, to discourage extravagance, declared, that no one shall be capable of being made a bankrupt but *only a trader*; nor capable of receiving the full benefit of its provisions, but only an *industrious* trader.

In treating of the law, as it now stands, regarding Bankrupts, there seems to be no necessity for enumerating the various acts of parliament which have been from time to time passed respecting them, all of which were lately more or less in operation before the recent statute began to take

(1) Inst. 4. 6. 40. Nov. 135. c. 1.

(2) Cod. 7. 71.

effect. They are no less than twenty-one in number, and are now all repealed by the first section of the new statute, beginning with the 34 & 35 H. 8. c. 4., and ending with the 5 G. 4. c. 98. The alterations made by that statute in the law of Bankruptcy are very considerable, embracing almost every branch and division of the former Bankrupt law. The persons liable to become Bankrupt are increased in number, and are more particularly defined; new modes of committing an act of bankruptcy are specified; more ample powers are given to the Lord Chancellor for the better working or superseding the commission, and for saving expence and delay to all the parties who have an interest in the Bankrupt's property; and more authority is given to the commissioners, both with respect to the Bankrupt, as well as over other persons whom it may be necessary to examine touching the act of bankruptcy, and the discovery of the Bankrupt's property. These, and various other alterations, will be pointed out in the following pages, according to the order in which the different subject-matters are successively disposed of.

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## CHAPTER I.

## OF THE JURISDICTION OF THE LORD CHANCELLOR,

1. *Over the Parties to, or those who come in under, the Commission.*
  2. *Over those who are Strangers to the Commission.*
- 

## SECTION I.

*Over the Parties to, or those who come in under, the Commission.*

WITH respect to the nature and origin of the Lord Chancellor's jurisdiction in bankruptcy, the matter does not appear to be involved in quite so much obscurity and mystery as a learned writer on the subject has alleged to be the case. (1) The first statute that gave him any jurisdiction was the 34 & 35 H. 8. c. 4., which gave also equal authority to the Lord Treasurer, and other great officers of state; any one of whom, together with two members of the Privy Council, or the two Chief Justices of either bench, might take such order and direction, as well with the body as the property of the bankrupt, as to their wisdom or discretion might seem fit. But ever since the 13 Eliz. c. 7., which conferred upon the Lord Chancellor or Lord Keeper of the Great Seal the exclusive authority to issue a *commission* of bankrupt, the great seal appears to have been in the sole and entire possession of all jurisdiction in matters of bankruptcy, upon which it determines in a summary way, and from its decision there is no appeal. (2) The twelfth section of the new statute, 6 G. 4. c. 16. (following the words nearly of the 13 Eliz. c. 7.) also gives the

Nature  
and origin  
of the juris-  
diction.

(1) 2 Christian's B. L. 6.

816. 1 V. & B. 211. Ex parte *Bry-*

(2) Ex parte *Matthews*, 3 Atk. ant, Ex parte *Hall*, 1 Rose, 13.

Lord Chancellor power to issue a commission to such persons as to him shall seem fit, who are to take the same order and direction, both with the bankrupt's person and estate, as is specified in the former statute; and by *Section 135.*, if there is no Lord Chancellor, then all powers and duties, given to and directed to be performed by him, are in that case to be performed and exercised by the Lord Keeper, or Lords Commissioners, of the Great Seal.

To every person (says Sir W. Evans, in his Letter to Sir Samuel Romilly on the Revision of the Bankrupt Laws (1),) who compares the very few provisions in the statute book respecting this extensive jurisdiction, with the numerous cases in the books of reports upon the exercise of it; who compares the terms in which the authority is given, with the extent to which it is carried; — it must be an obvious remark, — that never, upon so narrow a basis, was there erected so large a superstructure of authority, undefined, exclusive, and without appeal. But a considerable part of this authority, as well, indeed, as of the present jurisdiction exercised by courts of equity in a variety of subjects, may be traced (as that learned writer observes) to the principle, that every court is conclusively the judge of its own contempts; and, therefore, when any authority is assumed, and the disobedience of it is treated as matter of contempt, the consequence is, an indirect power of legislation, which no other tribunal is competent to control. This principle, however, which in its nature is so very susceptible of abuse, has been in general applied to beneficial purposes; and the Chancellor's jurisdiction in bankruptcy appears now to have been fully recognised by repeated acts of the legislature, as well as by a long series of judicial decisions. (2)

(1) Page 182.

(2) Mr. Christian (vol. ii. 212. 226.) refers great part of the Chancellor's jurisdiction in bankruptcy to the mere influence of recommendation and advice, and the

indirect control which he possesses over the commissioners, by means of his patronage, and his power of refusing to insert their names in other commissions: this the learned author consequently



It has been remarked by Lord Eldon, in some of those able judgments (1), which form now a complete code in this branch of our law, that the different statutes relating to bankrupts seem to have been framed, with a view to the authority with which the Lord Chancellor is entrusted in the exercise of his ordinary jurisdiction; and that when those statutes were silent, as to the mode of compelling obedience to the orders that might be necessary for carrying their provisions into effect, the practice has been to enforce it by the *general jurisdiction* of the Court of Chancery, without which the objects of a commission of bankrupt could not in many cases be thoroughly attained; and this practice, the same noble and learned Judge has declared it to be his conviction, was perfectly consistent with the intention of the legislature, in giving the jurisdiction it has done to the Chancellor in Bankruptcy. Indeed, it has been laid down in many cases, that an order of the Lord Chancellor in Bankruptcy is analogous, though not equal, to a decree of the Court of Chancery. (2)

Bankrupt laws framed with a view to the ordinary jurisdiction of the Chancellor.

This summary jurisdiction of the Lord Chancellor is, however, confined strictly to transactions relating to the bankruptcy; that is to say, to those arising between the *bankrupt, or the assignees*, and the *creditors* who have come in under the commission. The Lord Chancellor, therefore, sitting in Bankruptcy, cannot upon petition adjust any demands that one assignee may set up against another, concerning a private agreement between themselves, and not affecting the rest of the creditors. (3) Neither can he

Confined to transactions relating to the bankruptcy.

inferred to be, and designates, as a recommendatory jurisdiction, as distinguished from the mandatory jurisdiction expressly given by statute. But though this influence might operate in derogation of the power of the commissioners, it does not seem so very clear how it could increase that of the Chancellor, who, before he was enabled by the 13 Eliz. c. 7. to delegate a part of his authority to the commissioners,

was clothed with more ample powers by the preceding statute of 54 & 55 H. 8., which the statute of Elizabeth left free and untouched.

(1) 14 Ves. 451. *Ex parte Bradley*, 1 Rose, 203, 204.

(2) *Flower v. Herbert*, 2 Ves. 326. *Ex parte Cowan*, 3 B. & A. 129.

(3) Per Lord Hardwicke in matter of *Earl of Litchfield*, 1 Atk. 88.

compel the assignees to perform an agreement respecting a distribution of the bankrupt's property under a composition deed. (1) And so in recent cases, where certain parties were ordered to pay costs in Bankruptcy, and some of them paid the whole costs, it was held, that the Chancellor had no jurisdiction in bankruptcy to order contribution from the rest of the parties, — that being a question altogether collateral to the bankruptcy, and the proper subject of an action at law, or a bill in equity for an apportionment. (2) And where the bankrupt had deposited with A. the title-deeds of premises which he had previously mortgaged to R. and Co., and after the bankruptcy it was agreed between R. and Co., A., and the assignees, that the assignees should sell the premises, and apply the proceeds in payment of R. and Co. and A., and the solicitor of the bankrupt claimed a lien, on petition, by deposit of the title-deeds prior to A., — it was held, that there was no jurisdiction in Bankruptcy to determine the priority of this lien, as it was a question in which the estate of the bankrupt had no interest ; it being quite immaterial to the general creditors, whether the surplus produce of the property mortgaged was applied to pay the particular debt of A., or the particular debt of the petitioner : and it was also held in this case, that A. was not precluded from objecting to the jurisdiction, by filing affidavits as to the merits. (3) Any thing, however, that is necessary for the Chancellor to decide, in order to the question of proof of debts under the commission, will give him jurisdiction. (4)

But any thing necessary to the question of proof, gives him jurisdiction.

Power to send a case or direct an issue.

The Lord Chancellor has power also, when difficult questions of law are found to be involved in a petition in Bankruptcy, to send a case for the opinion of a court of Law ; or if a difficult question of fact occurs, then to direct an issue to try any litigated point between the parties, or

(1) *Ex parte Barfit*, 12 Ves. 15.

(2) *Ex parte Wilmshurst*, 1 G. & J. 4.

(5) *Ex parte Allison*, 1 G. & J.

(4) *Ex parte Rowton*, 1 Rose, 19.

an action to be brought by one against the other. (1) So he may in a matter of importance direct a bill in Chancery to be filed, in order to ascertain whether a debt is due or not (2); for, though he has no more power on a bill than on a petition, yet, in some cases, it is better that questions of importance requiring solemn discussion should be brought before the Court by way of bill; there being an appeal from his decision in this form of proceeding to the House of Lords: and Lord Hardwicke said, it was sometimes necessary to adopt that mode to settle the demands of creditors. (3)

The jurisdiction of the Lord Chancellor in Bankruptcy is both legal and equitable (4); but this arises more from long practice, perhaps, than from any precise authority on the subject. And his determinations, as it seems, are guided now, not as Lord Hardwicke once said, by way of analogy to the usual and ordinary proceedings of the Court of Chancery (5), but by certain established rules and principles of equity, which have been adopted in proceedings in bankruptcy, and are deduced from the powers that have been from time to time vested in him by the legislature. The whole of the proceedings in Bankruptcy, (observes Lord Eldon, who distinguishes them from the other proceedings of the Court,) begin in transactions upon oath; the trading, the debt, the act of bankruptcy, and the proceedings before the Chancellor, are always originally on affidavit. It is always in the discretion of the Court, (his Lordship adds,) upon an issue, to direct the petitioning creditor, or the bankrupt, or any other party to the petition, to be or not to be examined; and if it requires the jury to have before them, what the Court had

Jurisdiction both legal and equitable.

(1) *Ex parte Cottrell*, Cowp. 742.  
*Ex parte Gulston*, 1 Atk. 139.

(2) *Clarke v. Capron*, 2 Ves. jun. 666.

(3) *Bromley v. Gooderc*, 1 Atk. 76.  
*Hankey v. Garratt*, 1 C. B. L. 2.  
*Curtis v. Ashton*, *ibid.*

(4) *Ex parte Dewdney*, 15 Ves. 496. *Ex parte Hanson*, 12 Ves. 348. *Ex parte Roffey*, 19 Ves. 469.  
*Ex parte Hilton*, 1 Jac. & W. 470.

(5) *Ex parte Mathews*, 5 Atk. 817.

before it, it is usual, in order to elucidate the matter, to direct the parties to be examined. (1)

Jurisdiction over the commissioners, to suspend the assignment, and remove assignees.

Cannot discharge a bankrupt when committed, on a summary application.

Nor compel the commissioners to find the party a bankrupt. Nor reverse the order of the commissioners by bill.

The Chancellor has jurisdiction to control the conduct of the commissioners in all matters, where the legislature has fixed no certain time for acts to be done by them; he has, therefore, power to suspend the execution of the assignment after assignees have been chosen; and he has also power to remove the persons nominated by the creditors as assignees, even before the assignment is executed. (2) But though an appeal, generally speaking, lies in all matters of Bankruptcy from the determination of the commissioners to the Lord Chancellor by petition (3), yet if the commissioners commit a bankrupt for not answering to their satisfaction, the Lord Chancellor cannot upon a summary application, *sitting in Bankruptcy*, discharge him; but the mode of proceeding must be by *habeas corpus*, which writ the Chancellor has authority to issue in the vacation time (4); and upon the return to which, the Lord Chancellor, not under the bankrupt law, but as a law officer, will then review the conduct of the commissioners the same as any other Judge. (5) The Chancellor has, also, no authority to compel the commissioners to declare a party a bankrupt; he has only power to order them to proceed in their judgment. (6) And though the Chancellor may order *a bill* to be filed for certain purposes in bankruptcy, yet, upon a bill filed by the assignees against a creditor after a dividend, to have the proof of the debt expunged, the Chancellor cannot, in this mode of proceeding, reverse the order of the commissioners; for the proper course to do this is, not by a *suit* in Chancery, but

(1) *Ex parte Heywood*, 1 Rose, 45.; and see *Ex parte Smith*, 19 Ves. 473.

(2) *Ex parte Shaw*, 1 G. & J. 127.

(3) *Bromley v. Goodere*, 1 Atk. 77.

(4) *Crowley's case*, Buck. 264.

(5) *Ex parte King*, 11 Ves. 425. Lord Hardwicke, however, leaned to a different opinion upon this

question; and said, that he remembered a similar case before Lord Chancellor King in *Bankruptcy*, who, after he had taken some time to consider of it, determined the commitment of the commissioners to be justifiable. *Ex parte Lingood*, 1 Atk. 242.

(6) *Ex parte Perrin*, Buck. 510.

by petition to the Chancellor sitting in *Bankruptcy*. (1) So, where a bill was filed against bankrupts and their assignees, questioning the validity of the commission, and praying an account, or if the commission was legal, for leave to prove what should appear to be due under the bankruptcy, it was for the same reason held bad on general demurrer. (2) And so also a bill by assignees against a bankrupt, to restrain him from further proceedings at law to impeach the validity of the commission, was held equally untenable. (3)

The Lord Chancellor has no jurisdiction to interfere in a proceeding before a judge of *oyer and terminer*. He cannot, therefore, upon a petition in *Bankruptcy*, order the solicitor to the commission to pay costs for not attending to give evidence on the trial of an indictment against the bankrupt, by reason of which the bankrupt was acquitted; the remedy being by indictment or information against the solicitor for such neglect of duty. (4)

Neither has any other court power to review a final order made by the Lord Chancellor in any matter of *Bankruptcy*. And it seems that the Court of King's Bench has no authority to direct a *Prohibition* to the Chancellor sitting in *Bankruptcy*, though there is no express decision against the authority of the Court to issue such writ; but as no question of the kind (as the Lord Chief Justice Abbott observed,) has ever arisen since the institution of proceedings in bankruptcy, a period little short of 300 years, it is not a very unwarrantable inference, that no such writ of *Prohibition* lies. (5) In one case, indeed, before Lord Redesdale, he would not even permit costs awarded in bankruptcy to be made the subject of an action at law (6); but there is some doubt as to the correctness of this decision. (7)

Nor by bill, grant an injunction against a bankrupt. Cannot interfere in a proceeding before a judge of *oyer and terminer*.

No other court power to rescind the Lord Chancellor's order. No *Prohibition* lies against him.

(1) *Clarke v. Capron*, 2 Ves. 666.

(2) *Bailey v. Vincent*, 5 Mad. 48.

(3) *Kirkpatrick v. Dennett*, 1 G. & J. 500.

(4) *Ex parte Holliday*, 1 Atk. 201.

(5) *Ex parte Cowan*, 3 B. & A. 123.

(6) *In re Dillon*, 1 Sch. & Lef. 110.

(7) Per Lord Ellenborough, 2 M. & S. 439.

Lord Chancellor no power to appoint a receiver in bankruptcy,

nor to order an infant heir to convey.

Power to order the messenger's and solicitor's bills to be paid;

and transfer of stock.

Jurisdiction not deter-

The Lord Chancellor has no jurisdiction, upon a *petition in Bankruptcy*, to appoint a *receiver* of any part of the bankrupt's property; for, except in the case of idiots and lunatics, he has no such power, unless a cause is depending. If any person, therefore, claims an interest in the bankrupt's property, and wishes to have a receiver appointed, the proper mode is to file a short bill for that purpose. (1) Neither has the Chancellor any jurisdiction in bankruptcy to order an *infant heir* of a deceased assignee, to convey (as an infant trustee) the estates of the bankrupt vested in him by the decease of his ancestor; for the petition must be to the Chancellor generally, under the statute 7 Ann. c. 19., and not to him as sitting in Bankruptcy. (2)

He has jurisdiction, however, upon a summary application in Bankruptcy, to order the assignees to *pay the messenger* his bill of fees and expences under the commission; and this, notwithstanding even after a final dividend; for the assignees must be presumed to have known that they were indebted to the messenger, and the distribution of the funds, without having previously paid him, is their own misconduct. (3) So, with respect to the *solicitor's bill* of fees up to the choice of assignees, the Chancellor has in that case also authority, upon petition, to make an order upon the petitioning creditor for the payment of it (4); but not in this case, if there are no assets. (5)

When any *stock* is standing in the bankrupt's name as *trustee*, the Lord Chancellor has, by the 77th section of the new act, power to order the assignees, or any other person, whose consent is necessary, to transfer such stock to such person as the Chancellor shall think fit.

The Chancellor's jurisdiction in Bankruptcy is not determined by the *superseding* of the commission, as to any

(1) Ex parte *Tipper*, 1 Rose, 179. Ex parte *Whitfield*, 2 Atk. 315.

(2) Ex parte *Beddam*, 1 Rose, 310. Ex parte *Kirk*, Buck. 478.

(3) Ex parte *Hartopp*, 1 Rose, 450.

(4) 1 Rose, 450.

(5) Buck. 475.

act *previously done* under it ; for whatever has been done in the bankruptcy may be undone by petition. Therefore a petition will lie on behalf of a purchaser of the estates put up to sale by the assignees, for the repayment of the deposit, even after the commission is superseded (1); and the Chancellor also has equal power, notwithstanding the *supersedeas*, to order the petitioning creditor to pay the messenger his costs before the choice of assignees. (2) So he may at any time order the production and deposit of the proceedings, which were taken under the commission before it was superseded. (3) The greatest injustice, indeed, would often result from holding, that the jurisdiction of the Lord Chancellor is confined to the period, during which the commission subsists ; for then, (as the Lord Chief Justice Abbott well observed in a luminous judgment delivered by him upon this subject,) a person against whom a commission had issued, which was afterwards found not to be sustainable, and whose whole property had been taken from him by colour of it, must either bring an action at law, in which he might lose half the value for want of proof; or go through the slow process of a bill in equity for discovery and relief. A petition in bankruptcy is *festinum remedium*, and contributes not less to the saving of expence, than to the saving of time. The proceeding under the commission operates, by way of sudden seizure of property belonging, or supposed to belong, to a bankrupt. A process so speedy and summary, therefore, requires to be controlled by a speedy and summary course of relief. (4)

mined by  
the *super-*  
*sedes*.

In fine, the Lord Chancellor has full and perfect power to make any order whatever which he thinks necessary and expedient for the better distribution of the bankrupt's effects; and all parties concerned in the working the commission, who have either already availed themselves of any benefit resulting from it, or who have come in under it in

(1) *Ex parte Fector*, Buck. 428. *Ex parte Warren*, 1 Rose, 276.

(2) *Ex parte Johnson*, 1 G. & J. 19 Ves. 162.

23. (4) *Ex parte Cowan*, 3 B. & A.

(3) *Ex parte Bernal*, 11 Ves. 558. 123.

any way by *proof*, *petition*, or *otherwise*, with an intention to avail themselves of any benefit expected from it, are bound, as any party in a cause would be, to submit to any such order.

Vice  
Chan-  
cellor's ju-  
risdiction.

The Vice-Chancellor's jurisdiction in bankruptcy is derived from the 53 Geo. 3. c. 24. by which act the office was created; and under which he is empowered, by the direction of the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, to hear and determine all matters depending in the Court of Chancery, either as a court of law or equity, or that may be *incident to any ministerial office* of the Court, or which are *submitted to its jurisdiction*, or to that of the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal.

Some doubts, it seems, at first arose (1), under the construction of the act, whether the Vice-Chancellor had authority to hear a petition to *supersede* a commission; but it has been settled that he has such authority. (2) He may also hear a petition for the *procedendo* to issue, where a commission has been superseded by the Lord Chancellor's confirmation of his order for the *supersedeas* (3); and he may likewise certify the propriety of awarding the *procedendo*, in cases where a commission has been superseded upon his certificate. (4)

The *appeal* from the Vice-Chancellor's order is by petition to the Lord Chancellor, which must be signed by a barrister. (5)

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## SECTION II.

### *Of the Chancellor's Jurisdiction over those who are Strangers to the Commission.*

It is not very easy to reconcile some of the decisions under this head; but it is apprehended that all difficulties,

(1) 2 Rose, 162.

(2) 2 Rose, 235. note (a). 1 Mont.  
Dig. 141.

(3) Ex parte *Hurd*, Buck, 45.

(4) Ex parte *Crump*, Buck, 3.

(5) Ex parte *Holt*, Buck, 429.



as to the Chancellor's jurisdiction over strangers to the commission may be removed, by attending to a plain line of distinction that was very clearly drawn by Lord Eldon in expressing himself upon this subject. If a person *claims nothing under the commission*, then he cannot be brought by the assignees before the Chancellor on a petition in Bankruptcy, notwithstanding the assignees may allege, that he has money belonging to the bankrupt in his hands; the proper course is in such a case to bring an action, or file a bill, for the recovery of it. If, on the contrary, he *comes in of his own accord* to avail himself of the jurisdiction of the Chancellor in any matter relating to the bankruptcy, he must then submit to it in all respects, and the Court will enforce its order against him. (1) And though there may be a difficulty as to the jurisdiction, when a creditor, who is a stranger to the commission, merely applies to have the commission, or the certificate, removed out of the way of his proceeding at law against the bankrupt; yet, when the creditor goes further, and prays an enquiry into circumstances impeaching the validity of the commission, with a view to supersede it; or, in case the commission should not be superseded, that there may be a new choice of assignees, and that he may be admitted to prove, — it is then clear that he brings himself within the jurisdiction. (2) Whenever a party also, though a stranger to the commission, applies for and *obtains any order* in bankruptcy, he brings himself within the jurisdiction. (3) And it seems to follow, that when he only *petitions* the Chancellor for any relief relating to the proceedings under the bankruptcy, he, by the very circumstance of petitioning, submits himself to the jurisdiction.

It has been determined, however, that where the messenger under the commission takes possession of goods, as

Where a person claims nothing under the commission, cannot be brought within the jurisdiction, but may come in of his own accord,

by obtaining an order,

or by petitioning.

No jurisdiction to order re-

(1) *Ex parte Pease*, 1 Rose, 242. 19 Ves. 25. *Ex parte Hall*, 1 Rose, 13.

(2) *Ex parte Wardenburgh*, 1 Rose, 206.

(3) *Ex parte Bozannet*, 1 Rose, 181. *Ex parte Pease*, *ibid.* 242. 19 Ves. 25.

stitution  
to a mere  
claimant of  
property.  
Excep-  
tions:

short bills;

after claim  
established  
on an  
issue, may  
order com-  
pensation.

Cannot  
order  
bankrupt  
to indorse  
bills to a  
*stranger* to  
the com-  
mission,

the property of the bankrupt, the Chancellor has, generally speaking, no jurisdiction to order the goods to be delivered up to a party, *merely claiming* them as his own, without first directing an issue to try that fact. (1) Though in a clear case of property, or a very flagrant case of seizure, there is no doubt that the Chancellor has jurisdiction to order such restitution by the messenger, or the assignees; for the authority vested in him by the statute, to take order for the disposition of the bankrupt's effects, giving him general jurisdiction over the assignees, it does not seem that he oversteps that authority, when he orders them to restore property, which they are clearly not entitled to retain. And it is upon this principle, that he now invariably orders *short bills* (2) to be delivered up to the owner of them, in the case of a Banker's bankruptcy, after they have been seized by the messenger as the property of the bankrupt. (3) And where a party, whose property is wrongfully seized under a commission, establishes his interest on the trial of an issue at law, the Lord Chancellor has then power, not only to order restitution of the property, or its value, — but also to order the assignees to compensate the party for the damages which he has sustained by the seizure of the property, or by the subsequent mismanagement of it by the assignees. (4)

In a case, however, where the bankrupt had delivered bills to third persons for a valuable consideration, without indorsing them, it was decided, that the Chancellor had not jurisdiction to order the bankrupt, or his assignees, to indorse the bills to such third persons, — on the ground that such persons, being perfect *strangers* to the commission, were not bound to submit to the order of the Chancellor in this respect. (5) And where the acceptors of a bill, which

(1) Ex parte *Craggs*, 1 Rose, 25.

(2) See post.

(3) Ex parte *Rowton*, 1 Rose, 15. Ex parte *Pease*, *ibid.* 232. Ex parte *Buchanan*, *ibid.* 280. 19 Ves. 201. Ex parte *Burton Bank*, Rose, 162, &c.

(4) Ex parte *Cowan*, 3 B. & A. 126.

(5) Ex parte *Hall*, 1 Rose, 13.; and see ex parte *Stewart*, 1 G. & J. 344.; but see *contra* ex parte *Greening*, 13 Ves. 206. Ex parte *Mowbray*, 1 J. & W. 428.

had been discounted by the drawer with the bankrupt, joined the drawer in a petition, that upon payment of the balance due on the bill the assignees might be restrained from proceeding in any action on it, the Lord Chancellor dismissed the petition, as it appeared that the acceptors were perfect strangers to the commission. (1) These decisions, it must be confessed, seem somewhat irreconcilable with *ex parte Rowton*, and the cases of short bills; though at the same time it may be observed, there is some distinction between them. For in *ex parte Rowton*, the bills, having been seized by the messenger with the other effects of the bankrupt, were consequently more immediately under the control of the Lord Chancellor; while in *ex parte Hall*, the bills being in the hands of third persons, they might have been considered as effects not tangible under the commission, and over which the Chancellor had no direct control.

or restrain the assignees from suing a stranger.

When a creditor has *proved* under the commission, (Lord Eldon has said,) it gives the Court a jurisdiction, quite different from that which it is authorised to exercise, where there has been no proof; and that in such a case, where the assignees would have a lien on the dividends, if a claim is determined in their favour, they must in general proceed by *petition* against the creditor for the recovery of any sums, for which he has given credit on account. (2) And where the commissioners, in balancing the accounts between the bankrupt and a creditor, had found a balance due from the bankrupt to the creditor, the assignees were, on *petition*, restrained from proceeding, in an action at law against the creditor, for a balance which they claimed as due to them. (3)

Aliter, when a creditor has *proved*.

(1) *Ex parte Burton*, 1 Rose, 320. This case is given in some of the books (1 Mont. 266.), as deciding a point of *set-off*. The reasons for the Lord Chancellor's judgment do not appear in the report of the case; but it seems clear, that it proceeded on the ground of want of jurisdiction; and the only wonder is, that so plain a right of *set-off* could ever have been disputed.

(2) *Ex parte Hilton*, 1 Jac. & W. 467. *Ex parte Timbrel*, Buck. 305.

(3) *Ex parte Menzies*, 1 Rose, 395.

The Lord Chancellor has in one case refused, *on petition*, to set aside a purchase of the bankrupt's estate against a party, who was a stranger to the commission, — on the ground that his conduct was not controllable under the commission, and that such a proceeding ought to be by *bill*. (1) But in a late case before the Vice-Chancellor, a purchaser of the bankrupt's mortgaged estate, (sold before the commissioners under the general order,) who appears to have been a stranger to the commission, was upon *petition* ordered to complete his purchase, notwithstanding he did not even appear upon the hearing of the petition. (2) And the Lord Chancellor has power also, by the 78th section of the new statute, to order the bankrupt to join in any conveyance of his estate to a purchaser under the commission, either upon the petition of such purchaser, or of the assignees. (3) But the Chancellor has no authority in Bankruptcy to compel a second mortgagee, not claiming under the commission, but resting upon his security, to join in a sale obtained by a prior mortgagee (under the general order of the 8th May 1794), where the sale did not produce enough for both mortgages. (4)

No jurisdiction over second mortgagee, not claiming under commission.

In the case of waste,

When a petitioner, though a stranger to the commission, makes out a case of *waste* against the assignees, and prays an order in the nature of an *injunction* to restrain waste, the Lord Chancellor has jurisdiction in Bankruptcy to make such order. For though, as the Vice-Chancellor observed in this case, it is difficult to find upon what principle the Court first granted *injunctions* upon petition in Bankruptcy, — yet the practice being established, there was every reason to favour it, — as it afforded a speedy remedy in cases of an urgent nature. But, as between the lessor and the assignees of a bankrupt lessee, it has been determined that the Court has no jurisdiction, except in cases under the statute. (5) Therefore, where the lessor of a bankrupt

(1) Ex parte *Bennett*, 10 Ves. 382.

(2) Ex parte *Gould*, 1 G. & J. 231.

(3) It seems that he had not previously any jurisdiction to make

such an order. Ex parte *Stewart*, 1 G. & J. 344.

(4) Ex parte *Jackson*, 5 Ves. 357.

(5) Section 75.

lessee petitioned, that the assignees might be ordered to pay rent due after the bankruptcy, and for a compensation for hay, straw, &c. sold and carried off the premises by the assignees, — the petition was dismissed, on the ground that the Court had no jurisdiction in such a case, unless the petition made out a case for an injunction. (1)

In cases between a lessor and the assignees of a lessee.

As the Lord Chancellor has jurisdiction in Bankruptcy over the *accounts of a partnership*, upon a separate commission against an individual partner, — so, as a fair consequence of that practice, he has also jurisdiction, upon the petition of the solvent partner, to order the bankrupt partner to pay to him his share of the surplus of the joint effects received by the bankrupt, after paying 20s. in the pound. (2)

As to a solvent partner.

In the case of a *contempt* committed by any one against the authority of the Lord Chancellor in Bankruptcy, whether by a stranger, or a party to the commission, the Chancellor has in this case equal jurisdiction to punish the offender. Any obstruction of the messenger in the execution of his warrant from the commissioners, though without any previous order made by the Chancellor in the matter, amounts to such a contempt; and a person, giving a bond of indemnity against the consequences of such obstruction, is himself involved in the contempt. (3) So, wherever a fraud upon the Great Seal has been practised in issuing a commission, all persons implicated in the fraud may be brought before the Court by *petition*, notwithstanding such persons in other respects may be perfect strangers to the commission. (4)

Over strangers guilty of a contempt;

and in cases of fraud.

(1) Ex parte *Warwick*, Buck. 326.

(2) Ex parte *Lanfear*, 1 Rose, 442.

(3) Ex parte *Page*, 1 Rose, 1. Ex parte *Titner*, 1 Atk. 136. Ex parte *Dixon*, 8 Ves. 104.

(4) Ex parte *Boyle*, Buck. 247.

## CHAP. II.

## OF THE TRADING.

SECT. 1. *What Persons are liable to Bankruptcy.*2. *What is a sufficient Trading.*3. *What is not a sufficient Trading.*4. *The Place where the Trade must be carried on.*

## SECTION I.

*What Persons are liable to Bankruptcy.*Who may  
be made  
bankrupt.*Peers.**Members  
of House  
of Com-  
mons.**Clergy-  
men.*

1. **ALL** persons whatever, who are capable in law of making binding contracts, whatever their rank in society may be, are liable to become bankrupt, if they engage in trade. Thus even a *Peer* (1), who traded in wines, has been made a bankrupt; and a *member of the House of Commons* (2), also, incurs by trading the same liability. *Clergymen*, likewise, (though prohibited from trading, by the 21 H. 8. c. 13. s. 5.,) it was held, might become bankrupts — on the principle, that the breach of one law by any individual does not prevent his liability to another. (3) But by the 57 G. 3. c. 99. s. 3. a clergyman is now not only prohibited from trading, but every *contract* made by him in any trade is declared to be absolutely *void*. It follows, therefore, that as the petitioning creditor's debt (to ground a commission upon it) must be contracted *whilst the party is in trade* (4), a clergyman can now only be made a bankrupt, in respect of a debt contracted by him *before he entered into holy orders*. But any *public officer*, though not in that capacity an object of the bankrupt law, makes himself subject to it by embarking in trade. (5)

*Infant.*

An *infant*, though he may contract for his own benefit, and though his debts are only voidable by him at his own

(1) In the case of an Earl of Suffolk, mentioned by Lord Hardwicke, 1 Atk. 201.

(2) *Ibid.* and see post, 85.

(3) *Ex parte Meymot*, 1 Atk. 196. *Hanky v. Jones*, Cowp. 745.

(4) *Post*, 94.

(5) *Highmore v. Molloy*, 1 Atk. 266.

election, is not liable to bankruptcy; for an infant can owe nothing, strictly speaking, except for necessities; and no man can be made a bankrupt for debts which he is not obliged to pay. (1) And even if he is a partner with a person of mature age, a joint commission will be superseded, that is issued against him and his partner (2); though, if he holds himself out to the world as an adult, and *sui juris*, he cannot in that case apply *himself* to supersede a commission. (3)

A married woman cannot for the same reason be a bankrupt; unless, indeed, she is the wife or daughter of a freeman of London, and is a separate trader there according to the custom (4), — in which case she may be the object of a commission with respect to her separate effects in trade. And a married woman cannot be made a bankrupt, by reason of having traded before marriage as a *feme sole*; for her creditors, upon her marriage, become the creditors of her husband. (5)

Married woman.

(1) *Rex v. Cole*, 1 Ld. Raym. 448. *Ex parte Sydebotham*, 1 Atk. 148. Bull. N. P. 38. *Ex parte Mowle*, 14 Ves. 603.; and see 1 V. & B. 494.

(2) *Ex parte Barwis*, 6 Ves. 601.

(3) *Ex parte Watson*, 16 Ves. 265. *Ex parte Heck*, cit. *ibid*.

(4) *Ex parte Carington*, 1 Atk. 206. *Levie v. Phillips*, 3 Burr. 1776. 1 Bl. 570.

(5) *Ex parte Mear*, 2 Bro. 266. Mr. Cooke in his Bankrupt Laws (vol. i. p. 27. 5th edit.) seems to think, that any married woman who is separated by agreement from her husband, and carrying on trade on her own account, is liable to be made a bankrupt; and he cites a case before Lord Chancellor Apsley, where it was so held; but this appears to be the only case that warrants such a position. The principle on which this doctrine rests, as contended for by him, is, that if a married woman is liable to be sued to execution for the debts she has contracted dur-

ing coverture, therefore, a commission of bankrupt being considered in law as a statute execution, there is no reason why she should not likewise be subject to this statute execution. And, to establish this point, he gives at full length the case of *Ringstead v. Lady Lanesborough* (1 C. B. L. 28.), and several other cases. But all these cases seem to be over-ruled by those of *Beard v. Webb*, 2 Bos. & P. 93., and *Marshall v. Rutton*, 8 T. R. 545., in which it was decided, that a *feme covert*, though having a separate maintenance, and living apart from her husband, could not be sued at law for debts contracted during the separation. The result appears to be, that a married woman can only be made bankrupt, where she can be sued and taken in execution for her debts; and this can only be according to the custom of London, or where, perhaps, her husband has abjured the realm, become an exile, or been transported; in

*Lunatic.* A *lunatic*, it has been decided in one case (1), whilst under the influence of that dreadful malady, was incapable of committing an act of bankruptcy : but it has been since held, that as lunacy is no defence to an action, so neither is it against a commission of bankruptcy. (2)

A *person attainted*, — as he is liable (notwithstanding the attain) to be sued in a civil action, it seems, may also be subject to a commission of bankruptcy. (3)

## SECTION II.

### *What is a sufficient Trading.*

As the second section of the new statute (6 G. 4. c. 16.) enumerates what persons exercising certain specific trades and occupations shall be deemed traders liable to become bankrupt, it may be as well to take them in the same order as they are mentioned in the statute. They are as follows :

*Bankers.* *Bankers*, — who were first made liable to bankruptcy by the 5 G. 2. c. 30. s. 39. A person *acting* as a banker will be held to be one, though he does not keep an open banking-house (4); but a person acting only as an *Army Agent* cannot be considered a banker. (5)

*Brokers.* *Brokers*. These were also included in the 5 G. 2. A *Pawnbroker* has been held to come within this description ; for the general word *broker* is the genus, and all other kinds of brokerage the species. (6) And there seems no reason why a *Stock-broker* should not be included in it also. (7)

which cases he is considered as *civiliter mortuus*, and the woman a widow.

(1) *Ex parte Priddey*, 1 C. B. L. 37.

(2) *Anon.* 3 Ves. 590., and see Mr. J. Blackstone's remarks, in his Commentaries, upon the received maxim, that a man shall not be permitted to stultify himself. *Quære*, tamen, Whether a lunatic can contract a valid petitioning creditor's debt.

(3) *Ramsay v. Macdonald*, Foster, 61. *Ex parte Bullock*, 14 Ves. 464.

(4) *Ex parte Wilson*, 1 Atk. 218.

(5) 2 H. B. 235. 1 Mont. 12.

(6) *Highmore v. Molloy*, 1 Atk. 206. *Rawlinson v. Pearson*, 5 B. & A. 124. *Ex parte Stevens*, 4 Mad. 256.

(7) *Sed vide Colt v. Nettervill*, 2 P. Wms. 308.



**Scriveners**,—who were first made liable by the 1 Jac. 1. c. 19. **Scriveners**  
 s. 2. These are described by the new statute, as "persons receiving other men's monies or estates into their trust or custody." As the trade or calling of a scrivener *eo nomine* appears to be extinct (1), it is somewhat remarkable that the legislature should have recognized it as an existing trade; but having retained the generic term, it remains to inquire who are the persons that can be classed within it. A scrivener seems to have been employed formerly as a depository of money, upon trust to place it out on the best security he could for the account of the owner, and as an agent also in the negociation of loans, and other pecuniary transactions, being remunerated by a commission from those who employed him. This species of traffic has fallen now into the hands of bankers, annuity dealers, and attornies; and as the last persons cannot be made bankrupt in the character of *Attornies*, it may be useful to consider when they can, in the eye of the law, be looked upon as *scriveners*. When an *Attorney* is the general depository of the money of his clients and other persons, who employ him, not simply in his character of an attorney, but as a money agent, to invest their money upon securities at his own discretion, allowing him procuration fees for any sum placed out by him on bond or mortgage, as well as a fee or charge for the preparing of the deeds,—Mr. Baron Wood held, that such a course of dealing was substantially the business of a scrivener. (2) But if an attorney receives money as a mere channel to convey it from a lender to a borrower, or from one client to another, deriving his principal profit from drawing the securities, and from the business of an attorney and a conveyancer, in which such transactions may immediately engage him,—then he cannot with propriety be considered a scrivener. (3) Neither does a

When an attorney considered a scrivener.

When not.

(1) Per Gibbs C. J. 3 Camp. 539. The last genuine scrivener is said to have been a person of the name of Jack Ellis, a contemporary of Dr. Johnson, who is mentioned by

him with great respect. Ibid., and see Boswell's Life, vol. iii. p. 20.

(2) *Hutchinson v. Gascoigne*, 1 Holt. 507.

(3) Ibid.

~~Scrivener.~~ practising attorney, acting in the common and ordinary business of his profession, though he negotiates occasional loans of money, for which he even receives procuration fees, thereby become a scrivener (1); for this is only having incidentally, on particular occasions, the money of his clients to lay out for them. (2) The distinction to be drawn in every case is, whether the business transacted was incidental to the character of an attorney, or distinct from it; for it is not merely handling other men's money which makes a man a scrivener, — but he must get that money into his hands in a course of *trading*, whether that trading be for his own benefit only, or for that of other men also, as in the case of a factor. If the attorney, however, takes procuration money for loans, as well as his fees as an attorney, acting in the former instance to such an extent as to afford evidence of his intention always to do so, Lord Eldon decided that he might then be the object of a commission as a scrivener. But his Lordship added, though the same person might unite both the employments of an attorney and a scrivener, it must be ascertained in which transaction he was the one or the other; and that it was very doubtful whether the policy of the law would permit him to be *both* in the same transaction. (3) If a client, indeed, deposit a sum of money with an attorney, until the attorney can find a borrower, *pro hac vice* the attorney will be a money-scrivener; and a *course of dealing* of that description will render him liable to the Bankrupt law, though one or two instances merely would not have this effect. (4) Notwithstanding, therefore, an attorney may unite occasionally the employment of a scrivener, by negotiating an-

Distinction to be observed.

When he takes procuration fees.

When the attorney, the pre-

(1) Ex parte *Warren*, 2 Sch. & Lef. 414.

(2) *Adams v. Malkin*, 3 Camp. 534. Per Gibbs C. J., and see ex parte *Paterson*, 1 Rose, 402.

(3) Ex parte *Malkin*, 2 V. & B. 51. per Ld. E.

(4) Per Gibbs C. J., 3 Camp. 534. and see ex parte *Wilson*, 1 Atk.

218. Ex parte *Burchall*, Ibid. 141. *Bird v. Mayor*, Ld. Raym. 851., and Holt N. P. Rep. 510. where the reporter has in a note of much research thrown great light upon the ancient vocation of a scrivener, in which most of the cases on the subject are collected.

annuities and loans, yet when the attorney is the predominant character in these transactions, — that is, where the bonds, judgments, and warrants of attorney, by which the annuities are secured to the grantee, are prepared in his office, and he charges for them in his bill as an *attorney*, though the annuity commission may be included in these charges, — he will not be subject to the Bankrupt law as a scrivener. (1)

It has been decided also, that a *Clerk in the Custom-house*, who was employed by merchants to receive money on debentures, with which he discounted bills on his own account, was not a scrivener within the meaning of the Bankrupt law. (2)

dominant character, not a scrivener.

*Persons insuring Ships, or their freights, or other matters, against perils of the sea.* This description of persons (in common parlance called *Underwriters*) could not, before the new act, in that character, be made bankrupt. (3)

Underwriters.

*Warehoumen, Wharfingers, Packers.*

*Builders.* These were not considered traders within the former bankrupt laws. (4)

Warehousemen, wharfingers, &c. Builders, Carpenters, shipwrights.

*Carpenters, Shipwrights.* It was doubtful whether a carpenter could formerly be made bankrupt, the Judges having upon one occasion differed on the point (5); though Lord Holt decided that a ship-carpenter was within the former statutes. (6)

*Victuallers, Keepers of Inns, Taverns, Hotels, or Coffee-houses.* Neither victuallers, nor inn-keepers, could formerly be made bankrupts, as long as they confined themselves to supplying their guests *in the house*; but if their dealings showed a general intention to sell out of doors, however small the quantity actually sold, they were then considered liable. (7)

Innkeepers, &c.

(1) *Hard v. Brydges*, Holt, 654.

(2) *Hanson v. Harrison*, 2 Esp. 553. But quære, whether he would not now be held to be within the words of the new statute, viz. as "receiving other men's monies or estates into his trust or custody."

(3) *Ex parte Bell*, 15 Ves. 555.

(4) *Clark v. Wisdom*, 5 Esp. 147.

*Williams v. Stevens*, 2 Camp. 300.

(5) *Chapman v. Lamphire*, 3 Mod. 155.

(6) *Kirney v. Smith*, 1 Ld. Raym. 741.

(7) *Crisp v. Pratt*, Cro. Car. 549.

*Newton v. Trigg*, 3 Mod. 329.

**Dyers, &c.** *Dyers, Printers, Bleachers, Fullers, Calenderers.* A dyer was considered formerly a trader within the Bankrupt laws (1); though the authority usually referred to was certainly far from decisive on the point: and a bleacher, (according to Sir William Evans (2),) had no more right to be designated a trader than a washer-woman.

**Cattle dealers.**

*Cattle or Sheep Salesmen.* This designation will, it is apprehended, include *Drovers* (who were specially exempted from Bankruptcy by the 5 Geo. 2. c. 30. s. 40.); for, as it has been decided that a drover is not merely a person confined to the description in the 5 & 6 Edw. 6. c. 14. s. 16., but one who employs himself generally in buying cattle and selling them again (3), a drover may consequently either be considered as a *cattle salesman*,—or as a person “seeking his living by buying and selling goods or commodities.”

**General description.**

“All persons using the trade of merchandize by way of bargaining, exchange, bartering, *commission, consignment, or otherwise* (4), in gross or by retail.”

“All persons, who, either for themselves, or *as Agents or Factors for others*, seek their living by buying and selling; or by *Buying and Letting for Hire*, or by the *Workmanship of goods or commodities*.” (5)

**Factors,**

**buying and letting for hire**

*Factors* were also specified as persons liable to Bankruptcy by the 5 Geo. 2. c. 30.—though there have been some doubts expressed as to the extent of the meaning of the term (6), which the above description may perhaps remove. The words “buying and letting for hire” will include a large class of persons, who were not before

1 Salk. 109. *Saunderson v. Rowles*,  
4 Burr. 2067. *Buscall v. Hogg*,  
3 Wils. 146. *Patmore v. Vaughan*,  
1 T. R. 572. *Ex parte Maginnis*,  
1 Rose, 84.

(1) *Squire v. Johns*, Cro. Jac. 585.

(2) Letter to Sir S. Romilly,  
p. 167.

(3) *Bolton v. Sowerby*, 11 East,  
278. *Mills v. Hughes*, Willes, 588.  
and see per Bayley J., 11 East, 279.

(4) These words are newly in-

troduced into the description of  
the trading

(5) These words in italics are also  
new,—and are, as well as much of  
the other new matter in the descrip-  
tion of persons liable to become  
bankrupt, taken from the Scotch  
bankrupt act (33 G. 3. c. 74. s. 13.),  
in accordance, it is presumed, with  
the suggestions of Sir W. Evans, in  
his able letter to Sir S. Romilly,  
p. 167.

(6) Willes, 189.

strictly subject to the Bankrupt laws, such as *Job-masters*, *Livery-stable keepers*, *Hackney-men*, *Furniture brokers*, &c. A *Ship-owner* too, who was not formerly liable to be made a bankrupt, unless he freighted his ship with a cargo (1), will now, if he buys the vessel, and lets her out on charter, be held, no doubt, to come within the above description.

Persons seeking their living “*by the Workmanship of goods or commodities*” will comprehend all the operative Workmen. classes, save common labourers or workmen for hire, who are afterwards excepted by the statute. Indeed, various species of manufacturers and artizans, whose living is substantially gotten by mechanical labour, with a mixture of buying and selling, have, independently of the new statute, been always held to come within the Bankrupt law; — such as *Shoemakers*, *Smiths*, and the like, whose labour is only in amelioration of the commodity they buy, and to render it more fit for sale. (2) To these may also be added *Clothiers*(3), *Tanners*(3), *Bakers*(3), *Brewers*(3), *Plumbers*(4), *Nailors*(5), *Butchers*(6), and many others, to whom the same observation will apply.

Having thus disposed of the different *occupations and trades* specifically mentioned in the statute, it remains to consider the very comprehensive descriptions of “*all persons who seek their living by buying and selling*,” — and of those also, who “*use the trade of merchandize by way of bargaining, &c., in gross or by retail*.”

A *trader*, as Lord Camden has described him, is one Definition  
of a  
trader. who gains an extensive credit upon an uncertain and invisible capital; his credit being in proportion to the extent of his dealings, and being liable, from the very nature of his trade, to unforeseen losses, by the failure of those persons to whom he is obliged to give credit, and with whose credit his is interwoven. (7) To bring a man within the

(1) *Ex parte Bowes*, 4 Ves. 162.

(2) 2 Bl. Com. 476. Cro. Car. 31.

(3) 2 Com. Dig. 1 and 2.

(4) Hut. 46.

(5) *Goodinge*, 12.

(6) 4 Burr. 2148. *Dally v. Smith*.

(7) *Port v. Turton*, 2 Wils. 169.

descriptive words of the statute, as a person “seeking his living by buying and selling,” there must, of course, not only be proof of the *animus mercandi*, but of the *animus quaerendi victum mercando*. (1) And the buying and selling also should be a buying and selling of the *same commodity* to constitute a regular trading; for a man who lives by *buying only*, or *selling only*, cannot be a bankrupt. (2) It is immaterial, however, whether the commodity is sold again in the same state, or whether it is converted into any other shape, and has its value improved by the process of manufacture, or by manual labour bestowed upon it. Thus a *Merchant*, or *Retail Shopkeeper*, a *Manufacturer* on a large scale, or a *Common Artizan*, who seek their living by purchasing goods or materials, and selling them again, either in their original or altered state, are all equally traders within the Bankrupt law. A person who even deals in a commodity *illegally*, as a *Smuggler* (3), though he commits an offence against an act of parliament, and is punishable for so doing, is nevertheless considered a trader; for (as in the case of the *Clergyman* (4) before mentioned) he is not to avail himself of the breach of one law in order to avoid being subject to another. So a person *buying and selling Horses* may be a trader, though he has not taken out the licence required by law to deal in horses. (5)

A single  
act not  
sufficient.

*One single act* of buying and selling, however, will not make a man a trader within the Bankrupt law; for he could not be in that case said to *seek his living*, and, therefore, some repeated practice of buying and selling, and an endeavour to gain profit by so doing, is required to be proved. (6) For a man may import goods without selling them, or sell off goods previously bought for his private use or any special purpose, without being deemed a

(1) Ex parte *Paterson*, 1 Rose, 196. *Cobb v. Symonds*, 5 B. & A. 402. 516.

(2) Per Ld. M., *Hankey v. Jones*, Cowp. 750.

(3) Ex parte *Meynott*, 1 Atk.

(4) Ante, p. 20.

(5) Ex parte *Gibbs*, 2 Rose, 38.

(6) 2 Bl. Com. 476.

trader. (1) But trading in a very small degree will sustain a commission, if sufficient for the inference of an intention to deal generally; the trading depending not so much upon the quantity as upon the intention. (2) Neither is any profit an absolute ingredient to prove a man a trader; for the general presumption in all cases of Bankruptcy is, that there is no profit, — but either waste, imprudence, misfortune, or ignorant trading. The true criterion is, whether the party means to sell, with a view to profit, to any person who applies for the commodity in which he professes to deal. And the intention of the party to sell generally to all customers, or as a favour to particular persons, is a question of fact, that must be left in each particular case to a jury to determine. (3)

*The Publisher of a Newspaper*, having the whole daily impression from the proprietors, reselling it at a profit, and bearing the loss of such papers as remain unsold, has been considered to be a trader within the Bankrupt law, — notwithstanding he is in fact a servant of the proprietor of the newspaper. (4)

Publisher  
of a news-  
paper.

*Drawing and redrawing Bills of Exchange*, — if there be a continuation of doing so, with a view to gain a profit upon the exchange, is a trafficking in exchange, — and a trading, also, within the Bankrupt law. (5)

Drawing  
and re-  
drawing  
bills of  
exchange.

*A Fisherman*, buying fish of other boats at sea, and selling it on shore, has been likewise deemed a trader; but not if he merely sells the fish which he catches himself, or even if he buys a few fish occasionally to make up a sufficient cargo. (6)

Fisher-  
man.

(1) 3 Keb. 451. 1 Ventr. 29. 70.

(2) Ex parte *Moule*, 14 Ves. 602.

(3) *Patman v. Vaughan*, 1 T. R. 572. *Bartholomew v. Sherwood*, Ibid. 573. *Gale v. Halfknight*, 3 Star. 56.

(4) *Gillingham v. Laing*, 2 Marsh. 236. 6 Taunt. 532.

(5) *Richardson v. Bradshaw*, 1 Ark. 128., but see post. In the

5 G. 4. c. 98. the “drawing and redrawing, negotiating or discounting bills of exchange,” was made a specific act of trading; but that provision is, for some cause unknown, omitted in the present statute.

(6) *Heanny v. Birch*, 1 Rose, 356. Ex parte *Gallimore*, 2 Rose, 428., per Ld. Eldon.

Brick-  
maker.

A *Brickmaker*, who took the earth off the waste (for which he afterwards paid a consideration), with which he made the bricks, and sold them when made, has been held a trader. (1) But if he makes bricks from the produce of *his own soil*, whether he holds the land as a termor, or a freeholder, he is not then considered so; for every man has a right to make the most he can of the produce of his land, without being deemed a trader. But if he *purchases the clay* to make the bricks, he would then bring himself within the Bankrupt law. (2)

Owner of  
a colliery.

And, upon the same principle, the *owner of a Colliery* selling coal that he buys at market, together with that from his own mine, is a trader within the statute (3), though it is a question for the jury as to the *intention* with which he bought the coal. (4) For if a man buys any article, for the mere purpose of *mixing it* with the produce of his own land, in order to sell the mixture more advantageously, — he does not thereby become a trader. (5)

Lands or  
mines oc-  
cupied for  
a manu-  
facture.

But where *lands or mines* are occupied, not for the purpose merely of selling the produce, or of getting the ore, but for the purpose of carrying on a great *manufacture*, which renders it *necessary* to purchase other produce or ore, in order to mix with the produce or ore of the occupier's lands or mines, this becomes then a trading within the Bankrupt law. (6)

The question, in all these cases of working up the produce of the soil, is, whether the bricks are made, or the ore is manufactured, merely as a mode of *enjoying the profits of the land*, — or whether the making of the one, or the manufacture of the other, is done and carried on substantially and independently as a *trade*. And the same rule of con-

(1) *Ex parte Harrison*, 1 Bro. 173., and see note (1), p. 31.

(2) *Ex parte Gallimore*, 2 Rose, 424. *Sutton v. Weeley*, 7 East, 442., and see *Parker v. Wells*, 1 T. R. 34. 1 C. B. L. 41. et seq.

(3) *Port v. Turton*, 2 Wils. 169.

(4) 2 Rose, 424.

(5) *Patten v. Browne*, 7 Taunt. 409.

(6) *Crawshay v. Moule*, 1 Swanst. 495. 1 Wils. 181.



struction applies to *Manufacturers of Alum, Lime-burners, and proprietors of Stone quarries.* (1)

With respect to persons engaged in *Partnership*, —it has Partners.  
been held sufficient proof of trading, that a party acknowledge himself to have been in partnership with one who was a trader, and has also given directions in the concern, —although no positive act of buying and selling during the term of the partnership, as to him, may be established in evidence. (2)

An *Executor*, who carries on the trade of his testator, and Executor.  
in the course of such dealing buys and sells entire parcels and quantities of goods, is liable to be made a bankrupt; though he carries on the trade merely for the benefit of his testator's children (3), and though his name does not appear in the business. (4)

If a person *leaves off his trade* for some other employment, his doing so will not exempt him from his liability to be made a bankrupt, unless he discontinues it with the express object of abandoning it, and completely detaching from himself the character of a trader. (5) And still less will a person be exempted from such liability, who only partially discontinues his trade, or ceases to carry on only a particular portion of it. Thus a *Pawnbroker*, who had given over taking in goods on pledge, but continued to sell the unredeemed pledges, was held still to carry on the trade of a pawnbroker, and to be subject to the Bankrupt law. (6) So a *Manufacturer*, who merely ceases to manufacture more goods, does not lose the character of a trader if he continues to sell those already manufactured. (7) So also where a party was in partnership with another, which had Partial discontinuance of trading.

(1) *Brickmakers, Lime-burners, and Manufacturers of Alum*, were specifically enumerated by the 5 G. 4. c. 98. as persons liable to be made bankrupt; and there seems to be no reason why they should have been left out of the present statute.

(2) *Parker v. Barker*, 1 Brod. & Bing. 9.

(3) *Viner v. Cadell*, 3 Esp. 88. Ex parte *Garland*, 10 Ves. 110.

(4) *Hankey v. Towgood*, 1 C. B. L. 67.; but see post.

(5) Ex parte *Paterson*, 1 Rose, 402. Ex parte *Cundy*, 2 Rose, 257.

(6) *Rawlinson v. Pearson*, 5 B. & A. 124.

(7) *Wharen v. Routledge*, 5 Esp. 235.

been dissolved some years, and no act of trading had been done for two or three years before the petitioning creditor's debt accrued, but the concern had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of, — the trading in this case was held to be continued. (1) And though a trader retires altogether from business, yet if he owes debts contracted in the course of his trade, and afterwards commits an act of bankruptcy, he is still liable to be made a bankrupt. (2)

### SECTION III.

#### *What is not a sufficient Trading.*

What not  
sufficient.

In considering what is *not a sufficient* trading within the Bankrupt law, we may first notice those persons who are *specially exempted* from Bankruptcy by the statute.

Farmers.

1. *Farmers*, — who are also excepted by the 5 G. 2. c. 30.; and the reason of the exemption seems to be, that trade is not their *principal*, but only a *collateral* object; (their chief concern being to manure and till the ground, and make the best advantage of its produce;) and also, that the subjecting them to the law of Bankruptcy might be the means of defeating their landlords of the security, which the law has given the latter, above all other creditors for the payment of their reserved rents. (3) But this exception, of course, merely extends to them while they continue to deal *as farmers*; for if they trade in any commodity not incident to the farming business, their character of farmers will not exempt them from a liability to be made

(1) *Backhouse v. Tarleton*, 2 Star. Evid. 143.

(2) Ex parte *Bamford*, 15 Ves. 449. The early cases upon the question, whether a trader who had ceased to buy, but was selling off his stock, could be made a bankrupt, are not very satisfactory. (*Cotton v. Dainty*, 1 Ventr. 69. 2 Keb. 487. *Lutw.* 411. *Bateman's*

case, 1 Ventr. 166. *Naylor v. Hall*, Palm. 323.) The cases cited in the text, however, place the doctrine now upon its proper footing, — the material point for consideration being, whether the trade is *completely abandoned*, or whether it is only *partially discontinued*, with an intention to resume it.

(3) 2 Bl. Com. 474.

bankrupt. Therefore, though a farmer who makes cheese for sale, and buys salt and runnet to mix with the milk of which it is composed, is not thereby a trader, — yet if he *buys up the cheese* from other dairies and sells it, he in such a case becomes a trader. So also if he buys a greater quantity of horses or cattle, or of any other commodity, than can be fairly considered *necessary or incidental* to the enjoyment and stocking of his farm, and sells them again for profit. (1) But if he sells his horses or cattle when he has no longer need of them, — or if he purchases provender for his cattle, and, finding he has more than is requisite for their consumption, sells part of it again, — then either of these acts of buying and selling will not render him a trader. (2) So where a farmer, who kept hounds, was accustomed to purchase dead horses to feed them, and sell the skins and bones when the carrion was consumed, he was not considered a trader within the Bankrupt law; — notwithstanding on one occasion he had said that he should make a good thing of it; for the horses were purchased expressly for the dogs, and not with the view of any ulterior profit. (3) And where a farmer occasionally (that is, six times in twelve years) bought horses, hay, corn, &c. even with a view to sell again for profit, it was held that he did not thereby necessarily make himself a trader within the Bankrupt law; and that it was for a jury to determine, whether he was such a general dealer in horses, or those other articles, as to induce them to consider him as seeking his livelihood by buying and selling. In this last case Mr. J. Chambre observed, that he could not help thinking that in *Bartholomew v. Sherwood* (4) it was a pretty strong thing there to find the party a trader (5); and that

What not  
sufficient.

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(1) *Bartholomew v. Sherwood*, 1 T. R. 573. note (a). *Mayo v. Archer*, 1 Str. 513. Ex parte *Gi'bs*, 2 Rose, 38. *Wright v. Bird*, 1 Pri. 20.

(2) *Dutton v. Sowerby*, 11 East, 874.

(3) *Summersett v. Jervis*, 3 B. & B. 2. 6 Moore, 56.

(4) Supra

(5) He had bought and sold five or six horses for profit, in the course of two years.

What will  
suffice.

any gentleman might make a few occasional bargains, without having recourse to them as the means of seeking his living. (1) So if a farmer, from the deficiency or badness of his crops, buy other produce to mix with his own, in order to improve it, or to make up the usual quantity for sale, — this act of buying and selling will not subject him to the Bankrupt law; his object being not to become a regular dealer in the article bought and sold, but to make the most of the produce of his farm. (2)

Graziers.

2. *Graziers* are also excepted (as they were by the 5 G. 2. c. 30.) from liability to be made bankrupt; and for the same reason as applies to farmers. That statute (as has been before observed) also excepted *Drovers*; but the same reason of exemption is not applicable to them; a drover being a person who buys cattle at one town or market, and drives them to another for the purpose of speedily selling them (3); whilst a grazier, though he buys cattle for sale, yet agists them generally some length of time upon his farm, for the purpose of fattening them, and preparing them for the market. A *Cow-keeper*, also, who purchases cows and sells the milk, is considered within the description of a *farmer or grazier*, notwithstanding he sells the calves as well as the milk, and when the cows have ceased to yield milk, is in the practice also of fattening them for sale. (4)

*Drovers*  
not ex-  
empted.

*Cow-  
keeper.*

78  
*and Work-  
men.*

3. *Common Labourers, or Workmen for hire*, are also excepted by the statute, as they were by the 5 G. 2.; for these persons not only do not get their living by buying and selling, but they have also neither capital nor credit; both of which are essential ingredients in the character of a trader.

*Receiver-  
general.*

4. *Receiver-general of the Taxes*, — which office was also in the exceptions of the former statute; the principle of the ex

(1) *Stewart v. Bull*, 2 N. R. 78.

(3) *Willes*, 590.

(2) *Patten v. Browne*, 7 Taunt.

(4) *Carter v. Dean*, 1 Swanst. 64

409. Ex parte *Gallimore*, 2 Rose, 497.

Ex parte *Levyard*, cit. *ibid.* 1 Wil 85.

ception being, that the king should not be defeated of these extensive remedies, which are put into his hands by the prerogative. (1) What not sufficient.

5. *Member of, or subscriber to, any incorporated Commercial or trading Companies established by Charter or Act of parliament.* This exception was provided for before, by particular statutes (2), as to members of the Bank of England, and the East India and some other public companies,—but was not an express exception included in the Bankrupt law. Public Companies.

Besides these persons who are thus *specially exempted* from Bankruptcy by the statute, there are various others who by different judicial decisions have been held not to come within the Bankrupt law.

For as a *single* act of buying and selling will not constitute a trading (3), so neither will *occasional* acts under particular restraints, or for particular purposes. Thus the *Colonel of a Fencible regiment* who sells the cast-off horses of his regiment (4); a *Schoolmaster* who buys books to sell to his scholars (5); the *Owner of a Mine* (6) who buys candles to sell to his workmen; or a *Contractor for Victualing the King's fleet* (7), who merely buys provisions for that purpose, and sells off the surplus, is neither of them, in respect of such several dealing, liable to be made bankrupt. Colonel of Fencible regiment.  
Schoolmaster.  
Owner of a mine.  
Contractor.

So no man who holds a *Public Office*, and who, in order to fulfil the duties of it, is *obliged* to buy and sell, is a trader within the Bankrupt law,—if the buying and selling is strictly confined to the discharge of his official duties. (8) Thus the *King's Butler or Steward* (9), the *Butlers or Stewards of the Inns of Court*, *Sutlers of armies* (10), *Commis-* Persons holding a public office.  
  
King's butler, &c.

(1) 2 Bl. Com. 474.

(2) Whitm. B. L. 15.

(3) Ante, p. 9.

(4) Ex parte Blackmore, 6 Ves. 3.

(5) 3 Mod. 330. *Valentine v. Vaughan*, Peake, 76.

(6) Ex parte Walker, 1 C. B. L.

(7) Ex parte Craddock, ibid.

(7) Per Holt C. J. Comb. 182. 1 Salk. 109.

(8) Gibson v. Thompson, 3 Keb. 451.

(9) Skin. 292.

(10) 3 Keb. 451. C. B. L. 56.

What not  
sufficient.

Persons  
selling the  
produce of  
their land.

Lead and  
iron mines.  
Cider  
grower.

Coal-mine,  
stone-  
quarry.

Lime-  
burner.

Alum-  
works.

*sioners of the Excise, and Farmers of the Customs* (1), are none of them within the bankrupt law.

No person possessed of or occupying land, either as a freeholder or a termor, and selling the produce of it, whether obtained above or below the surface, is considered a trader within the law of Bankruptcy. And it makes no difference whether such produce is got and sold without undergoing any change, — or whether, after getting or gathering, it is worked up for sale in the usual way with other ingredients, and by various processes. Thus the worker of *Lead or Iron Mines*, or the *Cider-grower*, who respectively cause the ore and the apples to undergo different processes, before they are converted into the material which is sold, is no more liable to be made bankrupt than the owner of a *coal-mine* (2) or of a *stone-quarry* (3), or the *farmer or market gardener*, who sell the simple substance and produce of the soil in the same state, as it is respectively got and gathered. So the *making of flour* from corn grown on a man's own land, and selling it afterwards for profit, will not make him a trader. For all these different processes are only incidental to the necessary sale of the *produce of the soil*, and the usual mode of enjoying it. And for the same reason, the lessee of a farm on which was a *lime-kiln*, and which he worked as a *lime-burner*, was held not within the bankrupt law (4); — nor the lessee of *Alum-works*, — evidence being given of the usual mode of enjoying such works, and of the process of making alum; in which, it appears, the rude mass is the rock, which, after being dug, is burned, steeped, and boiled in lead, and then mixed with kelp, lees, and urine. (5) And though different ingredients, as has been already observed, may be *bought*, in order to mix with the produce of the land, and the better to manufacture it and bring it to market, — yet this circum-

(1) 1 Ventr. 270.

(2) *Port v. Turton*, 2 Wils. 169.

(3) *Ex parte Gardner*, 1 Rose, 377.; and see ante, p. 30.

(4) *Ex parte Ridge*, 1 Rose, 316.

1 V. & B. 360.

(5) *Newton v. Newton*, 1 C. B. L. 57.

stance of itself will not render a man the more liable to Bankruptcy. (1) The distinction that must not be lost sight of is, whether the materials are purchased, for the *express purpose* of putting the naked production of the earth into a manufactured and marketable state; or whether such production is an insignificant article, compared with the quantity or value of the materials bought, and of the manufacture itself. (2)

What not  
sufficient.

Upon this principle, the *Fisherman*, as we have seen (3), who does not obtain a sufficient cargo by his own fishing, and buys a few fish merely to complete it, and supply the market, is not held to be a trader (4); for, in order to enjoy the produce of his personal labour, he is thus compelled, as it were, to the act of buying occasionally, that he may be able to sell such produce. If, indeed, the materials bought are *beyond what is necessary* to supply the personal labour, it then becomes an act of trading. (5) But where a party, being engaged in the *Greenland fishery*, in the course of nine years made three different purchases of oil, one of which he had sold again, Lord Chief Justice Abbott thought it was too slight a case of dealing to warrant a jury in finding him a trader, and as one who had *sought his living* by buying and selling. (6)

Fisher-  
man.

As the proprietor or occupier of land cannot be made a bankrupt for acts of buying and selling its produce, so, *a fortiori*, the *buying and selling land itself*, or an interest in land, is not such a buying and selling, as will constitute a trading. (7)

Buying  
and sell-  
ing land.

*Bank stock and Government securities*, not being articles of merchandize, — the mere buying and selling them, it has been said, will not be a trading within the Bankrupt law (8);

Govern-  
ment se-  
curities,  
&c.

(1) *Patten v. Browne*, 7 Taunt. 409. *Ex parte Gallimore*, 2 Rose, 427.

(5) *Ibid.*

(6) *Gale v. Halfknight*, 3 Star. 56.

(2) *Parker v. Wells*, 1 T. R. 34.

(7) *Port v. Turton*, 2 Wils. 169.

(3) *Ante*, p. 29.

(8) 2 Bl. Com. 476. *Colt v. Net-*

(4) *Ex parte Gallimore*, 2 Rose, 428.

*terville*, 2 P. Wms. 308.

What not  
sufficient.

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Stock-  
broker;  
Quære.

Drawing  
and re-  
drawing  
bills of  
exchange.

Executor.

and this position has been laid down in all the books that have treated upon Bankruptcy. It is, however, a mere *obiter dictum* of Lord King, which was applied by him to the case of a *proprietor* of East India stock, and does not seem to be applicable to the case of a *Stock-broker*, receiving a commission for buying and selling stock for other persons.

With respect to persons engaged in the traffic of *drawing and redrawing Bills of Exchange, &c.*—it is not every drawing and re-drawing that will be considered to be traffic. For if a person having occasion for money to pay a debt on mortgage, or any other security, draws on his banker for it, and as a mode of repayment, permits the banker to draw on him by bills,—such a drawing and re-drawing would not, it seems, be held to constitute a trading. (1)

An *Executor*, who merely disposes of the stock in trade of his testator, does not thereby become a trader, even if he buys some additional goods to render those on hand more saleable. Therefore, where the *executor* of a wine-merchant found it necessary to buy wines to refine the stock left by his testator, his doing so was held not to render him a trader within the Bankrupt law. But if he had bought wines, and sold them to the customers *entire*, he would then, as we have already seen, have been liable to be made a bankrupt (2), notwithstanding even he was trading for the benefit of his testator's children. (3)

A buying in connection with others, with a view to carry on a system of fraud, is not a trading within the bankrupt law (4); but when a party represents himself as a dealer, and offers goods in exchange, it is then a question for the jury to say, if he does not buy to sell again. (5)

(1) Per Ld. M., *Hankey v. Jones*, Cowp. 761.

(2) Ex parte *Nutt*, 1 Atk. 102.

(3) *Viner v. Cadell*, 3 Esp. 88.  
10 Ves. 110.; and see ante, p. 31.

(4) *Millett v. Brandon*, 1 Carr. 380.

(5) *Ibid.*



## SECTION IV.

*Of the Place where the Trade must be carried on.*

The acts of buying and selling, which jointly constitute the trading, need not *both*, take place in England; for if a merchant, whether native, denizen, or alien, buys beyond sea and sells in England, or buys in England and sells beyond sea, — it is a sufficient trading to make him liable to a commission of Bankruptcy, provided he comes to this country, and *there* commits an act of Bankruptcy. For his trading to England procures him a credit here; and it is quite sufficient if he is occasionally, and not permanently resident in this country. (1)

(1) *Alexander v. Vaughan*, Cowp. 141. *Ex parte Williamson*, 1 Atk. 398. *Ex parte Smith*, cited Cowp. 82. *Inglis v. Grant*, 5 T. R. 539.  
 402. *Hitchcox v. Sedgwick*, 2 Vern. *Allen v. Cannon*, 4 B. & A. 418.  
 162. 1 Salk. 110. *Dodsworth v. Williams v. Nunn*, 1 Taunt. 279.  
*Anderson*, Sir T. Raym. 375. *Jones*,

## CHAP. III.

## OF THE ACT OF BANKRUPTCY.

1. *Of the Nature and Effect of an Act of Bankruptcy generally.*
  2. *Of the several Acts of Bankruptcy specified in the Statute.*
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## SECTION I.

*Of the Nature and Effect of an Act of Bankruptcy generally.*

**BEFORE** we enumerate the various acts of bankruptcy specified in the statute, it is proposed to consider the general nature and effect of an act of bankruptcy; which, though treated in many of the former statutes as a criminal act on the part of the bankrupt, has been now long regarded as nothing else than a mere proof or test of a trader's insolvency. And in this light it is viewed by the legislature in the several enactments of the present statute, which are more adapted to the relief of embarrassment and misfortune, than the punishment of fraud or crime.

Must not  
be of long  
standing.

An act of bankruptcy, to ground a commission on, ought to be one recently committed, or at least not one of very long standing; for there is sometimes great mischief in the relation back, which the law is obliged to give to the act of Bankruptcy; — and when that is endeavoured to be pushed to too great an extent, — as by suing out a commission on one committed several years ago, — the commission will be superseded. (1) The act must also be committed either *during trading, or subsequent thereto*, — and also *during the existence*

When  
must be  
commit-  
ted.

(1) *Ex parte Bowes*, 4 Ves. 175. 1 Lev. 13.

of a debt contracted when in trade. (1) And as the statute seems to be confined to England, and not to extend to acts done in other parts of the British dominions, or in foreign countries, (with the single exception of remaining out of the realm), — the act of bankruptcy must, therefore, with that exception, be committed in England. (2)

It must also be committed *before the commission is sealed*; though, if the sealing of the commission, and the committing of the act of bankruptcy, are on the same day, the priority of the act of bankruptcy may be established by evidence. (3) And in the case of a partnership, and a joint commission issued against the firm, *each of the partners* must have committed an act of bankruptcy in order to support the commission. (4)

The legislature having also expressly declared, by positive enactments, what shall be considered criterions of insolvency or fraud whereon to ground a commission of bankruptcy, none other can be admitted by inference or implication. (5)

A peculiar and a very important quality attached to an act of bankruptcy is, that, when once clearly committed, it cannot afterwards be explained away (6); even though the trader was perfectly unconscious at the time that he was committing an act of bankruptcy — and when he was so conscious, did immediately every thing in his power to recall it (7); or, even though the trader for some time afterwards continues perfectly solvent, and carries on a considerable trade. (8) But though a trader may commit a

Partners.

Not by implication.

Cannot be purged.

(1) *Ex parte Bamford*, 15 Ves. 449. *Ex parte Dewdney*, *ibid.* 495. 15 Ves. 462. 17 Ves. 198. 2 Bl. Com. 479.

(2) *Alexander v. Vaughan*, Cowp. 398. *Norden v. James*, Dick. 533. *Inghis v. Grant*, 5 T. R. 530. (6) *Hopkins v. Ellis*, 1 Salk. 110. Holt, 95. *Colkett v. Freeman*, 2 T. R. 59. *Wood v. Thwaites*, 3 Esp. 245.

(3) *Wydown's case*, 14 Ves. 80. *Ex parte Dufrene*, 1 Rose, 333. (7) 2 T. R. 62. *Mucklow v. May*, 2 Taunt. 479.

(4) *Mills v. Bennett*, 2 M. & S. 536. *Ex parte Mavor*, 19 Ves. 543. (8) *Hassells v. Simpson*, Doug. 69. *Pulling v. Tucker*, 4 B. & A. 382.

(5) 1 Bl. Rep. 442. 3 Cowp. 350.

plain act of bankruptcy, yet if he afterwards pays off or compounds with all his then creditors, he in that case becomes a new man, and will not afterwards be affected by it. (1)

Must not  
be con-  
certed.

An act of bankruptcy, *concerted* between the bankrupt and the petitioning creditor, is of no avail against creditors not privy nor consenting to it; for the presumption is, in such case, that the petitioning creditor is to have some peculiar advantage over the other creditors. (2) But a distinction has been lately made at law, between a commission founded upon a *concerted* act of bankruptcy, and a commission sued out at the *instance* merely of the bankrupt, — the former being held bad, but the latter good until it was superseded. (3) But this distinction is not recognised by the Lord Chancellor. (4) It is no objection, however, to an act of bankruptcy, that the trader has been advised to have recourse to it by a friend. (5) But when the attorney for the bankrupt was also attorney for the petitioning creditor, and recommended the bankrupt to be denied when he called with the petitioning creditor, — this act of bankruptcy was considered fraudulent, though the denial was without the knowledge of the petitioning creditor. (6) Notwithstanding, however, a concerted act of bankruptcy is bad against every one not privy to it, yet all persons, who are parties or privy to the commission of it, are wholly estopped from afterwards disputing it. (7) And there is a new act of bankruptcy included in the present statute, viz. the filing of a declaration of insolvency at the bankrupt-office, which is declared to be not invalid

But parties  
and privies  
estopped  
by it.

When not  
invalid.

(1) 1 Salk. 110.

(2) *Field v. Bellamy*, Bull. N.P. 39. *Hooper v. Smith*, 1 Bl. Rep. 441. *Bamford v. Baron*, 2 T. R. 394. *Eyre v. Birbeck*, cit. ibid. *Tappenden v. Burgess*, 4 East, 230.

(3) *Shew v. Williams*, 1 Ry. & M. 19.

(4) *Ex parte Staff*, Buck. 431. *Ex parte Grant*, 1 G. & J. 17.; and see *ex parte Prosser*, Buck. 77.

*Ex parte Brookes*, ibid. 257. *Ex parte Moule*, 14 Ves. 602. *Ex parte Binner*, 1 Mad. 250.

(5) *Roberts v. Teasdale*, Penke, 27.

(6) *Prosser v. Smith*, 1 Holt, 442.

(7) *Bramley v. Munde*, B. N. P. 39. *Allan v. Hartley*, 1 C. B. L. 92. *Stewart v. Rickman*, 1 Esp. 108. 1 Bl. 441. 2 T. R. 594. 4 East, 230.

by reason of its being concerted between the bankrupt and any other person. (1)

## SECTION II.

*Of the several Acts of Bankruptcy specified in the Statute.*

The *third* and *five* following clauses of the new statute describe what are to be henceforth considered *acts of bankruptcy*,—including not only those under the former statutes, but also specifying some which were doubted, or which were not in reality acts of bankruptcy, under the former law. They are no less than *seventeen* in number, besides *two* others, which are only applicable to *members of parliament*. Those affecting the general trader are as follows :

1. *Departing the Realm.*
  2. *Being out of the Realm, and remaining abroad.*
  3. *Departing from his Dwelling-house.*
  4. *Otherwise absenting himself.*
  5. *Beginning to keep his House.*
  6. *Suffering himself to be arrested for any debt not due.*
  7. *Yielding himself to Prison.*
  8. *Suffering himself to be Outlawed.*
  9. *Procuring himself to be arrested.*
  10. *Procuring his goods, money, or chattels to be attached, sequestered, or taken in execution.*
  11. *Making, or causing to be made, either within this realm or elsewhere, any fraudulent Grant or Conveyance of any of his lands, tenements, goods, or chattels. (2)*
  12. *Making, or causing to be made, any fraudulent Surrender of any of his Copyhold lands or tenements.*
  13. *Making, or causing to be made, any fraudulent Gift, Delivery, or Transfer of any of his goods or chattels.*
- With intent, in any of these cases, to defeat or delay his creditors.*

Enumeration of acts of bankruptcy.

(1) Section 7. and see post.

(2) See vide sect. 4. and post.

Enumeration of  
acts of  
bank-  
ruptcy.

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All the above-mentioned acts of bankruptcy are, therefore, jointly made up of *action and intent*, — being in themselves, considered as *acts alone*, indifferent and equivocal, and deriving their character only from the *intent* that accompanies the act; but these that follow are in themselves *substantive acts of bankruptcy*, and where the *intent* to delay creditors is wholly immaterial.

14. *Having been arrested, or committed to Prison, for debt, or non-payment of money, — and thereupon lying in prison for twenty-one days. (1)*

15. *Escaping out of Prison, or custody, after having been so arrested, committed, or detained; the act of bankruptcy in this case to relate back to the time of such arrest, commitment, or detention. (2)*

16. *Filing a declaration in the office of the secretary of bankrupts, signed by himself, and attested by an attorney or solicitor, that the party is Insolvent, or unable to meet his engagements. (3)*

17. *After a docket struck, paying money, or giving or delivering any satisfaction or security for his debt, or any part thereof, to the person striking the docket, whereby such person may receive more in the pound in respect of his debt, than the other creditors. (4)*

To the above may be added another act of bankruptcy, specifically declared to be such by the last Insolvent Debtor's Act, (the 7 G. 4. c. 57. s. 13.) (5) namely, *filing a petition by an insolvent to take the benefit of that act.*

Having thus enumerated all the acts of bankruptcy affecting the general trader, it is now proposed to consider each of them separately, for the purpose of examining how

(1) Sect. 5. By the former law, the time was two months; and see post 55. for the more full description of this act of bankruptcy.

(2) Sect. 5.

(3) Sect. 6.

(4) Sect. 8.

(5) This, it is to be hoped, is the

last of the numerous acts of parliament on this prolific subject; which has given birth to no less than ten voluminous statutes within the last sixteen years. There really appears to be no end of legislation on insolvency.

those which were previously in operation have been severally construed by the various decisions of our courts.

And first, as to *Departing the Realm*, whereby a man withdraws himself from the jurisdiction and coercion of the law of his own country. Whenever a trader hath endeavoured in such manner to avoid his creditors, or evade their just demands, this has uniformly been declared by the legislature to be an act of bankruptcy. For in this extra-judicial method of proceeding, which is allowed merely for the benefit of commerce, the law has always been extremely watchful to detect a man, (whose circumstances are declining,) in the first instance, or at least as early as possible, that the creditors may receive as large a proportion of their debts as may be; and that the trader may not go on wantonly wasting his substance, and then claim the benefit of the statute, when he has nothing left to distribute. (1) And this observation, indeed, applies to every other act of bankruptcy, as well as to the one now under consideration. Slight evidence, of the *intention* to defeat or delay his creditors, will be sufficient to accompany the proof of departing the realm, if it appear that creditors are *in fact delayed*, and that such delay was the *inevitable consequence* of the departure; for it is a principle in law, that every one must be supposed to foresee and intend what is the *necessary consequence* of his own acts (2); as, indeed, it is frequently holden in criminal cases, that the plain and palpable consequences of an act done, are, when unexplained, evidence of malice or a felonious intent. Therefore, where a trader fled beyond seas for the murder of his wife, whereby his creditors were delayed, he was held to have committed an act of bankruptcy. (3) So, where a married man ran away with a young lady, and took her abroad, where he continued to live with her, and his creditors were thereby delayed in the recovery of their

*Departing the Realm.*

Slight evidence of intention necessary, when actual delay. Intention inferred when delay the necessary consequence of departure.

(1) 2 Bl Com. 477.

Per Gibbs C. J. *Holroyd v. Whitehead*, 2 Camp. 530.

(2) Per Lord Ellenborough, *Rambottom v. Lewis*, 1 Camp. 280.

(3) *Woodier's case*, Bull. N. P. 39.

*Departing  
the Realm.*

debts, — this was also held an act of bankruptcy. (1) In both these cases it will be observed, that the parties went abroad under circumstances, that rendered it highly probable they had conceived the *intention not to return* to this country; one having committed murder, and the other being also amenable to the laws of his country for a different offence.

When  
motive  
may be  
collected,  
&c.

When the *departing the Realm* is of itself equivocal as to the intention, the motive may be collected from the subsequent letters written by the party during the *early part* of his residence abroad; though the declarations of a bankrupt, respecting his motive for doing a particular act, are not receivable in evidence, when made *long subsequent* to the act in question. (2)

Leaving  
England  
for Ire-  
land.

If a trader, whose house of business is in Ireland, comes to England to settle his affairs, and upon being informed that one of his creditors intends to arrest him, quits England and goes over to Ireland, in order to avoid such arrest, — this has been held to be such a departing of the realm, as is sufficient to constitute an act of bankruptcy. (3) But if he leaves England with an honest intention, compatible with trade, and *bona fide* intending to return, he does not, then, by his departure, commit an act of bankruptcy. (4) So where a trader quitted his residence at Liverpool, and went to Rio Janeiro, having first circulated an advertisement, that he was going out there in a particular ship, with an intention of settling there, and would take charge of any shipments by such vessel, — he was held not to have committed an act of bankruptcy; for he would never have circulated such an advertisement, if his intention had been to *conceal* himself from his creditors. (5) So a trader, having business both in England and in Spain, has

Advertis-  
ing his in-  
tention to  
go abroad.

(1) *Raikes v. Porcau*, 1 C. B. L. 75.; and see *Vernon v. Hankey*, 1 C. B. L. 98.

(2) *Rawson v. Haigh*, 2 Bing. 99.; and see *Ex parte Hague*, 1 Rose, 151. *Windham v. Paterson*, 1 Star. 144.

(3) *Williams v. Nunn*, 1 Taunt. 270.

(4) *Windham v. Paterson*, 1 Star.

144.  
(5) *Ex parte Osborne*, 1 Rose, 387.; and see *Hopkins v. Ellis*, 1 Salk. 110.



a right to go to the latter country to look after his concerns; and though his creditors in this case may be thereby delayed, yet his departure cannot be construed to be an act of bankruptcy. But if he is actuated also by the fear of arrest,—though such fear concurs with the justifiable motive, namely, that of looking after his business,—then the departure will be an act of bankruptcy. (1)

When fear of arrest co-operates.

2. *Being out of the Realm and remaining abroad.* This is a new and distinct act of bankruptcy, created by the present statute, and will save some difficulty that has frequently occurred, as to the proof of *intention in departing the Realm*; for there will be no need now, as there was in former cases, when the party remained some time abroad, to *infer* an intention for his *departure*, which perhaps never mingled with the original motive; nor to construe a continued into a pre-determined absence. (2) The *intention* of the party to *delay* his creditors, however, must be collected, in proving this act of bankruptcy, from the same circumstances, as are applicable to the proof of the preceding one. Thus, if a trader, after departing the Realm in the first instance for a proper object, protracts his residence abroad for an *unreasonable* length of time, assigning no cause for his absence, and leaving *no funds*, nor making any arrangements in this country for the *payment of his debts*;—it will not be a very hard construction of his conduct, to *infer*, that he “remains abroad with intent to delay his creditors.”

Being out of the Realm, &c.

Intention, how to be collected.

(1) *Warner v. Barber*, 1 Holt, 175.

(2) See *Ex parte Matric*, 5 Ves. 576. *Windham v. Paterson*, 1 Star. 144. 4 Camp. 286. *Ex parte Osborne*, 1 Rose, 387. 1 V. & B. 177. *Ex parte Gulston*, 1 Atk. 195. In *Windham v. Paterson*, 4 Camp. 286., Lord Ellenborough held, that a continued residence abroad was an act of bankruptcy under the words “otherwise absenting himself,” in the 1 Jac. 1. c. 15.; but the learned reporter in a note to the case, as well as Mr. Eden, in his late treatise on the Bankrupt Law (p. 16.

note g.) question the correctness of this decision, on the ground, that an act of bankruptcy could not then be committed abroad. But it is submitted, that the *absence from England*, and not any positive act committed abroad, was the gist of the act of bankruptcy in that case; and that it might with equal reason be contended, that *departing the realm* was an act of bankruptcy committed abroad; for the *act of departure* is not strictly consummated, until the party actually reaches some point out of British jurisdiction.

*Departing from dwelling-house.*

Departure must be voluntary.

Where delay the necessary consequence of departure.

If intention clear, no actual delay necessary.

3. *Departing from his Dwelling-house.* In this case, as in that of departing the realm, the *intention* must be to defeat or delay his creditors. This intention may also, as in that, be manifest, or collected from circumstances, or it may be presumed from the necessary consequences resulting from the departure. The departure must be *voluntary*, and not compulsory; for, where a man is arrested, and thereby obliged to leave his house, such a departure is not an act of bankruptcy. (1) But when a trader, from distress of mind, or any other motive, quits his dwelling-house without any intention to return, and without leaving directions how his business is to be carried on in his absence, and creditors are thereby in fact delayed, — he must in such case, as has been before observed, be taken to foresee and intend the necessary consequences of his own act, whatever the original motive may have been for his departure. (2)

If it is quite clear that the *intention* is to *avoid his creditors*, then it will be immaterial whether any creditor was delayed in his absence or not. This point, which was often mooted under the former bankrupt laws 3), had, nevertheless, been settled by several cases (4) before the passing of the new statute; but the words of this statute are also sufficiently declaratory, that the *departure* of itself, coupled with the *intent*, constitute a perfect act of bankruptcy. The fact of creditors being delayed may still be properly resorted to in evidence, for the purpose of explaining an act, which might otherwise be equivocal; but where the *intention* is *manifest*, no actual delay need be proved. And this observation applies, not only to this particular act of bankruptcy, but to all the others specified in the third section of the statute.

(1) *Phillips v. Sheriff of Essex*, 1 C. B. L. 85.

(2) *Holroyd v. Whitehead*, 3 Camp. 530

(3) *Barnard v. Vaughan*, 8 T. R. 149.

(4) *Robertson v. Liddell*, 9 East, 497. *Hammond v. Hicks*, 5 Esp.

139. *Williams v. Nunn*, 1 Taunt.

270. *Wilson v. Norman*, 1 Esp.

334. *Holroyd v. Whitehead*, *supra*.  
Ex parte *Wydown*, 14 Ves. 84.

The *distance* that a man departs to, after leaving his dwelling-house, or the *period of time* that he is absent from it, are also perfectly immaterial, if the real motive is concealment from his creditors. His going to a distant place among strangers may be an act of bankruptcy, though he is visible there; and the going only to the next house, may also be the same, if he is not visible. (1) Thus where a man rode out of town in order to avoid being arrested, and returned in the evening, and the next morning sent for the bailiff, and told him he went out in order to get the term of the plaintiff, — this was held to be such a departing from the dwelling-house, as was sufficient to constitute an act of bankruptcy. (2) So where a trader went to his neighbour's house, and told him he expected every moment to be arrested, and, while he remained there, was informed that a sheriff's officer was going towards his house, upon which he concealed himself in a back room, desiring his neighbour to watch, and when told that the officer had gone past his house, and had left the street, immediately then returned home, — this temporary absence from his dwelling-house was held to be an act of bankruptcy (3); and indeed it would make no difference if his departure from his dwelling-house had proceeded from a *groundless apprehension* of being arrested. (4) In such a case it is not necessary, in order to prove the act of bankruptcy, to show that any writ had in fact issued against the bankrupt. (5) And if a trader, on being applied to for payment by a creditor, leaves his house under pretence of getting money, but goes to a billiard-table, and remains there the whole evening, — this has also been held an act of bankruptcy. (6)

*Departure from dwelling-house.*

Distance, or time of absence, immaterial.

Motives.

In all these cases we have seen, that the departure from the dwelling-house has originated from the fear of meeting

What is not an act of bankruptcy.

(1) Per Buller J. *Aldridge v. Ireland*, cit. 1 Taunt. 273.

(4) Ex parte *Bamford*, 15 Ves. 449.

(2) *Maylin v. Eyles*, 2 Str. 809.

(5) *Wilson v. Norman*, 1 Esp. 334.

(3) *Chenoweth v. Haley*, 1 M. & S. 676; and see *Bayley v. Schofield*, 1 M. & S. 338.

(6) *Bigg v. Spooner*, 2 Esp. 661.

*Departure  
from dwell-  
ing-house.*

When  
motive  
laudable,  
delay im-  
material.  
Leaving  
home to  
recover a  
debt,

or to ar-  
range with  
a creditor,  
leaving  
word  
where he  
is gone;

or for any  
other law-  
ful pur-  
pose, leav-  
ing word,  
&c.

a creditor, the apprehension of being arrested, or from some desire of concealment, in consequence of the trader's embarrassments.

But where it is clearly *not his intent* in going from home to defraud or delay his creditors, but his motive is laudable,—as if he departs on a journey for the purpose of getting in money owing to him,—he does not thereby commit an act of bankruptcy, though his absence is actually productive of delay to some of his creditors. Thus where a trader at *Manchester*, receiving intelligence that a debtor of his in *London* was in a failing condition, left his house, and went to *London*, for the purpose of arranging his affairs with his debtor, and getting security for his demand,—he was held not to have committed an act of bankruptcy,—though he stayed away ten days, and several of his creditors in his absence called at his house at *Manchester* for payment of their debts, and went away unsatisfied, from no provision being made for payment of them; for it was considered, that his intention in going from home was not to *delay* his creditors, but for the purpose of obtaining money to *prevent* their being delayed. (1) So where a female trader left her house at Bath, for the purpose of persuading one of her creditors in London to withdraw an execution against her stock, and previously told her servants *where she was going*, as well as the object of her journey,—and also left with them her direction, for any person who might inquire for her;—this again was held to be not an act of bankruptcy; as there appeared to be no wish to keep out of the way of her creditors, who had only to call at her house to know *where* she was. (2)

And the leaving home *bonâ fide* for exercise, or entertainment, or any other lawful purpose, is not an act of bankruptcy, notwithstanding a creditor may in the interim

(1) *Fowler v. Padget*, 7 T. R. 509. 1 Taunt. 273.; but see *Deffle v. Desanges*, 8 Taunt. 671: 3 Moore,

(2) *Aldridge v. Ireland*, cit. 7. post.

call in vain for his debt. (1) Thus, where a man goes from home, leaving word with his clerk *what time* the same day he shall return home, and actually does return at the appointed time, — this is not an act of bankruptcy, though a creditor called for money in his absence, and his clerk, by his directions, told the creditor that he would not let him have it, and that he should go out of the way till dinner-time; for a man, who intends to delay a creditor, does not usually *name the hour* when he is on the same day to be met with at home. (2) So, if he absents himself from his house in order to *avoid harsh language* from some of his creditors, whom he had appointed to come to his counting house, and examine his books; for the motive was not to delay the creditors; but to avoid altercation with them. (3)

*Departure  
from dwell-  
ing-house.*  
————

Leaving  
home to  
avoid al-  
tercation.

It is laid down in some of the books (4), that there is a difference between absconding to avoid a *debt*, and absconding to avoid a *duty* only; and that a departure, occasioned by the fears of being attached for the non-performance of an *award*, or to avoid an arrest upon a writ of *excommunicato capiendo*, is not an act of bankruptcy. But this position, it is apprehended, must now receive some qualification; for if the absence is *indefinite*, and no provision is made for payment of debts, nor any directions left for creditors *where he may be found* by them, such a departure would now be held to fall within that class of cases, which establish that a man is taken to intend, what is the necessary consequence of his own acts. (5)

Abscond-  
ing to  
avoid a  
duty.

4. *Otherwise Absenting himself.* Where a man has a counting-house distinct from his dwelling-house, and leaves the former without the *animus revertendi*; though he may remain afterwards two or three days at his dwelling-house, he begins to absent himself from the time he leaves his counting-house; and the act of bankruptcy is complete by

*Otherwise  
absenting  
himself.*

(1) Per Lord Ellenborough,  
9 East, 492. *Robertson v. Liddell*.

(2) *Vincent v. Prater*, 4 Taunt.  
603.

(3) Ibid.

(4) *Lingood v. Eade*, 1 Atk. 196.

2 Com. Dig. 5.

(5) Ante, page 45.

*Otherwise  
absenting.*

Where he  
has no  
settled  
home.

Retiring  
behind the  
scenes of  
a theatre.

Conceal-  
ing himself  
in the  
house of  
a friend.

Not where  
absence  
concerted.

such departure from it. (1) Indeed, it may frequently happen, that a trader has neither dwelling-house, nor counting-house,—in which case his withdrawing himself from the usual place where he is to be found, or where he transacts his business, will be sufficient to constitute an act of bankruptcy, within the meaning of the words “*otherwise absenting himself*,”—which are not confined to any particular place. Therefore, if a man, who has no settled home, takes up a *temporary abode* at a public-house in the town to which his business carries him, and leaves it for fear of his creditors,—this will be considered an act of bankruptcy. (2) So, if a man, who has no known place of abode, is in the habit of attending the Royal Exchange to transact his business, and leaves it on the approach of his creditors, desiring a friend to say he is not there; or breaks an appointment he has made with a creditor to meet him there to pay his debt—either of these cases will be an act of bankruptcy. (3) So also, where the proprietor of a theatre retired behind the scenes to avoid a sheriff’s officer, giving orders at the same time to be denied to him,—this was held to be such an absenting himself, as would come within the meaning of the present statute. (4) And if a man, after being arrested for debt, escapes to the house of another person, and is there denied to the officer who pursues him,—this will also be an act of bankruptcy. (5) But where a trader, being informed by the attorney of the petitioning creditor, that he had delivered a warrant to a sheriff’s officer to arrest him, and the attorney advised him to repair to his office to avoid the publicity of being arrested in the street, which he did, and remained there a considerable time,—this was holden not an act of bankruptcy;

(1) *Judine v. Da Cossen*, 1 N. R. 234. There is a case of *Young v. Wright*, 6 Taunt. 540., usually referred to upon this head; which, however, seems to establish no satisfactory position.

(2) *Holroyd v. Gwynne*, 2 Taunt. 176.

(3) *Gimingham v. Laing*, 2 Marsh. 236. 6 Taunt. 532.

(4) *Ibid.*

(5) *Bayley v. Schofield*, 1 M. & S. 338.

though if the recommendation had not been by the attorney of the petitioning creditor, the case would perhaps have borne a different complexion. (1) A mere breach of engagement also, to meet a creditor at a given place is not, in itself, evidence of an act of bankruptcy, without proof that the absence was with a view to *delay* the creditor. (2)

Keeping house.

Where two partners left their shop, and told their shopman that they were going out to endeavour to get some bills discounted, and directed him to say that they were not in the way, or to make some excuse for them in case a creditor should call; and a jury found that they absented themselves with an intent to delay their creditor, the Court of Common Pleas held they were warranted in such conclusion. (3)

Leaving shop, and desiring a servant to make excuse.

5. *Beginning to Keep House.* This act of bankruptcy is generally made out, by proving the party to have been denied by his own orders to a creditor, who calls for payment of his debt, the party himself being at home at the time. The mere *denial*, however, is not of itself *the act* of bankruptcy; but only *prima facie* evidence of the party keeping his house, with intent to delay his creditors; and this may be proved in many other ways, besides being denied to a creditor; though it seems to have been for some time held, that an actual denial was indispensable in proof to establish this act of bankruptcy. (4) But as it is the *intent* to delay, and not the *actual* delay, which must accompany the beginning to keep house, — there is no obligation to prove that the intention was *effected*, if there are circumstances enough to show, what the intention really was. Therefore the *intention* of keeping house being clearly proved by other evidence, there is no necessity to superadd the proof of denial to a creditor; a species of evidence, indeed, which

As to necessity of denial.

(1) *Mills v. Elton*, 3 Pri. 142.

(4) *Garratt v. Moule*, 5 T. R.

(2) *Tucker v. Jones*, 2 Bing. 2. 575. *Hawkes v. Saunders*, C. B. L.

(3) *Deffe v. Desanges*, 8 Taunt. 74.

671. *Copper v. Desanges*, 3 Moore, 4.

**Keeping  
house.**

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need never be resorted to, except for the purpose of explaining conduct that might otherwise be deemed equivocal. For instance, — if a trader gives *general orders* to be denied, then the fact of a *creditor* calling and being denied will be important evidence, not only of the beginning to keep house, but also to show what the *intention* of the party was in giving such orders. Or, if he direct his servant to deny him to some individual by *name*, — then it will be essential to prove that that individual was a *creditor*; and if there is no other evidence of keeping house, then that such person actually called and was denied. Thus the necessity of proving an *actual denial* to a creditor occurs only, where there is otherwise no evidence of keeping house, or of what the *intention* of the party is in keeping house. Where it is said, therefore, in some of the books (1), that there must be an *actual denial*, as well as an *order* to deny, to constitute an act of bankruptcy, this must be understood to apply to cases, where there is *no other proof* of the party beginning to keep house.

**Cases of  
Denial.**

But it is proposed to consider first the cases, where the *denial to a creditor* forms the principal ingredient in the proof, of the party beginning to keep house, before we treat of those, where other circumstances have been admitted, to establish this particular act of bankruptcy.

**Must be  
by pre-  
vious di-  
rections,  
and to a  
creditor,  
whose  
debt is  
due.**

In the first place, the denial must be in consequence of *previous directions* from the debtor; for, unless it is so, no subsequent approbation of it by him will render it an act of bankruptcy. (2) The denial, too, must be to a *creditor*, whose debt is *then due*; for if he is only a creditor by a note payable at a *future* day, a denial to such a creditor will not be an act of bankruptcy (3); since, no creditor can be said to be defeated, or delayed, in the recovery of a debt, where there is no debt which he can legally demand the payment of. In such a case, however, it is conceived, if

(1) *Jackmor v. Nightingale*, Bull. N. P. 40. 1 C. B. L. 79.

(2) *Ex parte Foster*, 1 Rose, 50.

(3) 7 Vin. Ab. 61. pl. 14. *Ex parte Levy*.



the order to be denied was given under an apprehension, that *other creditors, whose debts were due*, would call,—then the actual denial, being proof (at all events) of keeping house, would, coupled with proof of the *intent* of the party in ordering himself to be denied, constitute, as it should seem, a perfect act of bankruptcy.

*Keeping house.*

The better opinion seems to be, that the denial *need not* be to the creditor *himself*; but that it will be sufficient, if made to the clerk of the creditor, or any other person coming on his behalf, and by his authority, to demand the debt,—upon proof that the trader knew him to be such clerk, or agent (1); though Lord Camden, at Nisi Prius, once held the contrary. (2) So a denial to a *tax-gatherer*, who calls for taxes, is also an act of bankruptcy; for the tax-gather is an agent on behalf of the crown, and the crown cannot be said, in this instance, not to be a creditor. (3) So also a denial to the *collector of the church and highway rates* will be an act of bankruptcy, for he may be equally considered a creditor,—the debt in this case being created by the assessment, and when the assessment is made, the debt then becoming due and demandable. (4) And whether the creditor calls for payment of his debt, or security for it, or to buy goods to the amount in order to cover it,—a denial will be equally an act of bankruptcy; for the statute does not contemplate the *object of the creditor* in calling, but the *intention of the debtor* in being denied. (5) But if the trader knows, that the creditor is coming upon some other business, and not for payment or satisfaction of his debt, and refuses to see him,—then, the moment his knowledge of that purpose is proved, his intention to delay will be negatived. (6) And it has been ruled at Nisi Prius, that a denial to a bailiff, who had previously arrested the

Denial need not be to the creditor *himself*:

to a tax-gatherer;

to collector of church-rates.

Immaterial whether creditor calls for payment, or satisfaction.

Denial to a bailiff after arrest;

(1) *Brandegee v. Munday*, B. N. P. 39. *Ex parte Bamford*, 15 Ves. 449. (4) *Lloyd v. Heathcote*, 2 Brod. & B. 388. 5 Moore, 129.

(2) *Barrow v. Foster*, C. B. L. 83. (5) *Ex parte Harris*, 2 Rose, 67. *Ex parte White*, 3 Ves. & B. 128.

(6) *Ibid.*

(3) *Jeffs v. Smith*, 2 Taunt. 117.

**Keeping house.**

to persons  
whom the  
servant  
believed  
creditors;

where cre-  
ditor does  
not ask to  
see the  
bankrupt.

No objec-  
tion that  
t  
was seen,  
when de-  
nied.

Need not  
be the  
party's  
own dwell-  
ing-house.

party, and released him on his undertaking to give bail, is not an act of bankruptcy, — on the ground, that the denial is not to avoid a creditor, but merely to avoid the execution of a bail-bond. (1)

A denial to several persons, whom the servant of the bankrupt, from their frequent calling, believed to be creditors, is evidence to go a jury to say whether they were creditors or not. (2)

A denial to a creditor, though he demands payment of his debt, — yet if he does not ask for the debtor, or express a wish to see him personally, it has been said, is incomplete proof of the party keeping house. (3) But such a transaction does not in fact amount to a *denial*; for where there is no request to see, there can be no *denial* to be seen. The circumstance, however, of the creditor *calling for his debt* would go far to explain the *intention* of the party in giving orders to be denied, — and, with very slight evidence of keeping house, would probably be sufficient to establish an act of bankruptcy.

It is no objection to the proof of beginning to keep house, that, when the trader was denied, he was actually seen by the creditor through the window of a partition, and was heard giving directions to be denied. (4)

The fact of keeping house is not construed to mean *strictly* his *own* dwelling-house; for, it is held, if a man have no house of his own, and keep in another man's house, — that would be within the meaning of the statute; and the same, when a party keeps on ship-board, — or if a miller keep himself within his mill, — or a churchwarden within his church. (5) Accordingly, where a trader, carry-

(1) *Schooling v. Lee*, 3 Sta. 151. *Sed quare*, whether such a denial ought not to be construed with an *intention to delay* a creditor; and whether it does not fall within the principle of that class of cases, in which it is held, that a party, keeping out of the way to avoid an arrest, commits an act of bankruptcy?

(2) *Jameson v. Eamer*, 1 Esp 381.

(3) *Dudley v. Vaughan*, 1 Camp. 271.

(4) *Ex parte Bamford*, 15 Ves. 449.

(5) Com. Dig. "Bankrupt," c.i. Cullen, 57.

ing on business at Warwick, came occasionally to London to make purchases for his trade, and while in London was frequently at the counting-house of a correspondent, where other persons were in the habit of calling upon him,—it was held, that his desiring his correspondent to deny him to a creditor, whom he expected to call, and concealing himself in his correspondent's house when the creditor did call, was such a beginning to keep house, as amounted to an act of bankruptcy. (1)

*Keeping  
house.*

In a recent case at Nisi Prius, indeed, it is laid down, that a creditor has a right to call on his debtor *where he pleases*, to demand payment of his debt,—and that a denial to a creditor *at any place*, though not the bankrupt's usual place of business, was equally an act of bankruptcy. (2) But it is apprehended that this proposition is laid down too broadly to stand the strict test of examination; and that the denial must be at a place, which was then either the bankrupt's place of residence, or that of his common resort,—or one, at least, where he had appointed a creditor to meet him, or where he had taken a temporary shelter for the purpose of concealment.

When the party has *once* been denied by his own orders to a creditor, with a view to delay him, though the creditor is delayed but for one hour, and is in fact afterwards admitted in consequence of his importunity (3), — the denial will nevertheless be an act of bankruptcy. Thus where a trader denied himself at *nine in the morning* to a creditor presenting a bill for payment,—though he afterwards in the course of the day appeared in public, and paid the bill before *five o'clock in the afternoon*,—this was held to be an unequivocal act of bankruptcy, which could not be explained away by subsequent circumstances. (4) So where a trader gave a general order to be denied, and was in

When  
*once a  
creditor  
denied,  
period of  
delay im-  
material;*

or that the  
intention  
was to be

(1) *Curteis v. Willis*, 1 Ryan & M. 58. Dowl. & R. 224.

(3) *Wood v. Thwaites*, 3 Esp. 245.

(4) *Colkett v. Freeman*, 2 T. R.

(2) *Park v. Prosser*, 1 Carring. 59.

*Keeping house.*

denied to a different creditor.

Denial capable of being explained by circumstances.

whilst at dinner.

On a Sunday.

But after general orders to deny, cannot be explained.

Where denial by the wife.

consequence denied to a particular creditor, whom it was *not his object to be denied to*, though he immediately overtook the creditor, and said he was not afraid of *him*, but of *another* creditor; this was held also such a beginning to keep house as was sufficient to constitute an act of bankruptcy. (1)

There are many acts of denial, however, even to a creditor, which may be explained by circumstances to show that there was *no intention to delay* the creditor, but that the denial proceeded from another motive;—such as being engaged with company or business, by a temporary retirement and privacy during a period of sickness or domestic affliction, or during the ordinary hours of sleep or refreshment. (2) Thus where a creditor had been in the habit of calling whilst the trader was at dinner, who told his servant that the creditor was troublesome in calling for money at that hour, and desired he might be denied to him;—and the creditor called twice afterwards, when the trader was denied, but was accessible to all his other creditors at business hours,—this was held to be not an act of bankruptcy. (3) Neither is it an act of bankruptcy for a man to cause himself to be denied on a Sunday, notwithstanding the creditor may have been even appointed to call on that day for the express purpose of receiving his money. (4)

But where a trader has once given a *general order* to be denied to creditors, it will be no excuse that he happens to be ill in bed, when a creditor afterwards does call for his debt; for the denial in this case will be referable to his previous orders, and not to his sickness as the cause. (5)

Where the trader is denied by his wife, though the wife

(1) *Mucklow v. May*, 1 Taunt. 479.

(2) *Ex parte Hall*, 1 Atk. 201. *Field v. Bellamy*, B. N. P. 39. *Ex parte Preston*, 2 Rose, 21. 1 Burr. 484. *Stafford v. Clarke*, 1 Carringt. N. P. Rep. 159.

(3) *Smith v. Currie*, 3 Camp. 549. *Shaw v. Thompson*, 1 Holt. 159.

(4) *Ex parte Preston*, 2 Rose, 21. 2 Brod. & B. 312.

(5) *Lazarus v. Waithman*, 5 Moore, 363.

herself cannot be called to prove the denial, yet other witnesses may prove that her husband gave her orders to deny him, and that she did actually deny him to some creditors who called. (1)

*Keeping house.*

A denial to a creditor, however, though conclusive evidence, if unexplained, of a beginning to keep house,—yet, as has been before observed, it is not the *only* evidence by which this act of bankruptcy can be established. Thus if a man shuts himself up for a month in his bed-chamber, with the exception of Sundays, giving directions merely to be denied to every body that called,—this will not only be sufficient proof of his *keeping his house*, but of his doing so with *intent to delay* his creditors. (2) So where a merchant left his counting-house where he usually sat, and retired into a secluded parlour, where he drew the curtains to prevent being seen, and during such seclusion several creditors called, who must have seen him had he remained in the counting-house,—such a concealment was held sufficient evidence of an act of bankruptcy. (3) So where a trader desired his servants not to let into the house any persons whom they did not know, for fear of being arrested,—and on the following morning the doors of the house were kept shut, and no person was admitted, until it had been ascertained from the window who he was,—it was held that this amounted to an act of bankruptcy, though no creditor was actually denied. (4) If the trader, also, has no clerk or servant,—as the act of keeping house cannot then of course be evinced through the medium of a *denial*,—it will be amply proved, in such a case, if he shuts himself up in his house, debarring all access to it, whereby his creditors are delayed. And, indeed, it may be laid down generally, that wherever a trader secludes himself in his

Denial not the only evidence.

Keeping bed-chamber;

retiring to a secluded parlour;

debarring all access to the house;

or secluding himself.

(1) *Lloyd v. Heathcote*, 2 B. & 271. *Castell's* bankruptcy cit. per B. 388. 5 Moore, 129. Bayley J., 1 M. & S. 354.

(2) *Bayley v. Schofield*, 1 M. & (4) *Harvey v. Ramsbottom*, 1 B. S. 349. *Lloyd v. Heathcote*, supra. & C. 55.

(3) *Dudley v. Vaughan*, 1 Camp.

**Keeping  
house.**

house, to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, — he begins to keep house within the meaning of the statute. (1)

only going  
out in the  
evening.

There may also be circumstances in a man's conduct where he has given no orders to be denied, and where there is not proof of a complete seclusion, which will amount to an act of bankruptcy under this head of *beginning to keep house*. As where a trader, whose counting-house was in a town, and his dwelling-house in the country, did not go to his counting-house, nor into the town, — but sent for his papers to be brought to his dwelling-house, and only went out for the purpose of taking an evening walk in the country; — Lord Eldon said there was no doubt but that that sort of keeping house would be an act of bankruptcy. (2)

**Banker  
stopping  
payment.**

A banker *stopping payment*, or refusing to pay money when called upon for that purpose, does not thereby commit an act of bankruptcy, — if he keeps his shop open, and does not conceal himself. (3) And the shutting up a banker's shop by one partner, is not an act of bankruptcy in his co-partner residing in another place. (4)

In all these cases of *keeping house*, as well indeed as in those of *departing from his dwelling-house*, or *absenting himself*, — what the party says to his servant, or any other person, *when* he leaves his dwelling, or begins to seclude himself, — is receivable in evidence to prove the *intention* (5); but what he says must be contemporary with, or immediately subsequent to, the act done. (6)

(1) Per Lord Ellenborough, 1 Camp. 272.

(2) Ex parte *Bourne*, 16 Ves. 149.

(3) *Hopkins v. Grey*, 7 Mod. 139. *Pakenham v. Bland*, Ca. in Chancery, in Lord King's Time, 42, 43. 7 Ba. Ab. 61. pl. 12, 13.

(4) Ex parte *Mavor*, 19 Ves. 543.

(5) *Jameson v. Eamer*, 1 Esp. 381. *Bateman v. Bailey*, 5 T. R. 512. B. N. P. 40. *Ambrose v. Clendon*, Annals, 267. 4 Esp. 233. *Wilson v. Norman*, 1 Esp. 334. *Robertson v. Liddell*, 9 East, 487.

(6) *Robson v. Kemp*, 4 Esp. 231. *Marsh v. Meager*, 1 Star. 353.; and see post, title "Evidence."

6. *Suffering himself to be arrested for any debt not due.* (1) *Suffering himself to be arrested, &c.*  
 The object of this enactment is, no doubt, to provide against a voluntary submission to an arrest for a fictitious debt; but the suffering himself to be arrested upon a bill of exchange *not due*, or indeed for any debt *solvendum in futuro* (if the *intention* is to defeat or delay a creditor) would, it is apprehended, come within the meaning of the statute.

7. *Yielding himself to Prison.* (2) The yielding must of course be voluntary, and not compulsory, — and the intent, to defeat or delay a creditor. But a *bonâ fide* surrender in discharge of bail will not come within this act of bankruptcy; for that is a duty incumbent upon every defendant, if necessary, to exonerate those who have become sureties for him in the action; and as the bail have a right to take and render a defendant in their own discharge, (he being, in the eye of the law, already in their custody,) a voluntary surrender would be only doing that which he might be at any time compelled to do by his bail. If a trader, however, who is capable of paying, will, from *fraudulent motives*, voluntarily go to prison, — that will be an act of bankruptcy. Therefore where a man was arrested for 28*l.*, and, though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition, — he was held to have committed an act of bankruptcy. (3)

8. *Suffering himself to be outlawed.* (4) An Outlawry in Ireland will not make a man a bankrupt here, — for that is considered as an act of bankruptcy committed abroad. (5) *Suffering himself to be outlawed.*  
 And an outlawry suffered without the intent to defeat or delay a creditor, is not an act of bankruptcy. (6) It is

(1) This was also an act of bankruptcy by 13 Eliz. c. 13. and 1 Jac. 1. c. 15. s. 2.

(2) This is also taken from the above-mentioned statutes of Eliz. and James.

(3) Ex parte *Barton*. 7 Vin. Ab. 61.

(4) This is also from the two statutes of Eliz. and James.

(5) Com. Dig. "Bankrupt," C. 4.

(6) *Bradford v. Bloodworth*, 1 Keb. 11. 1 Lev. 15.

Suffering  
outlawry.

laid down by Lord Chief Baron Comyns (1), (upon the authorities, as it is presumed, which are cited below (2), but he himself cites no authority for the position,) that the outlawry will not be an act of bankruptcy, if it be reversed before the commission of bankrupt issues, — or if it be reversed for default of proclamations, even after the commission. There is some qualification, however, as to this last position in Viner, which is not noticed by Comyns; the passage in Viner being: “if the outlawry be reversed for want of proclamations, all that is done in the mean time by the commissioners is void; *contra*, if it was reversed *on a writ of error*.” But this can scarcely now be considered as law; for if the outlawry were suffered fraudulently *ab initio*, with an *intention* to defeat or delay a creditor, — no subsequent event would, it is submitted, be sufficient to clear the fraud, or prevent the operation of the Bankrupt law, — any more than a denial to a creditor, once made with intent to delay him, can be explained away by any subsequent circumstances. (3)

Procuring  
himself to  
be arrested.

9. *Procuring himself to be arrested.* This act of bankruptcy is taken from the 1 Jac. 1. c. 15. s. 2. *Any* arrest made by a man's own procurement will come within this head of bankruptcy, — it being immaterial whether the arrest is for a real, or a fictitious, debt.

Fraudu-  
lent attach-  
ment, &c.

10. *Procuring his goods, money, or chattels to be attached, sequestered, or taken in execution.* This act of bankruptcy is also included in the 1 Jac. 1. c. 15. s. 2., with the exception only of the last words, which have been very properly added in the present statute; it having been holden under the statute of James that a fraudulent *execution*, though void as against creditors, was not a procuring of goods to be *attached*, — which meant only a proceeding by *foreign attachment* in London, or in those other towns where that species of process is used. (4)

(1) Com. Dig. *supra*.

(2) 7 Vin. Abr. 61. pl. 10. R. S.  
L. 186. *Stone's Read.* 124.

(3) See ante, 22.; and C. B. L. 85.

(4) *Clavey v. Hayley*, Cowp. 427.  
*Harman v. Spottiswood*, cit. *ibid*.



An *attachment* out of any court, for *mere default* or *laches*, would not be an attachment within the meaning of the statute; for such an attachment could not be considered to be with a defendant's own *procurement*. A *sequestration of tithes*, also, issued against a person who has a rectory inappropriate, for not repairing the chancel of his church, is for the same reason not an act of bankruptcy. (1) And where a trader, hearing that a writ of *fi. fa.* is issued against him, clandestinely conveyed his goods out of his house, and concealed them privately, in order to prevent them from being levied in execution, — this, it was determined, though a palpable fraud, did not amount to an act of bankruptcy. (2)

*Fraudulent attachment.*

11. *Making or causing to be made, either within this realm, or elsewhere, any fraudulent Grant or Conveyance of any of his lands, tenements, goods, or chattels.* This act of bankruptcy is from the 1 Jac. 1. c. 15. s. 2.; but it includes any grant or conveyance *executed abroad*, as well as those executed in this country; it having been decided under the statute of James, that a deed executed in India, or any foreign country, was not an act of bankruptcy, on the ground that no act of bankruptcy could be committed abroad. (3)

*Fraudulent conveyance.*

The Grant or Conveyance contemplated by the statute is a grant or conveyance *by deed*, with a proper stamp affixed to it; for if the instrument only amounts to an *agreement* to transfer or assign any part of a trader's effects, or an *agreement* to accept a composition, — it is not an act of bankruptcy under the above head. (4)

*Must be by deed.*

There are two species of fraudulent conveyances comprehended within the statute; 1st, those which are void, either at common law for fraud, or under the statute of fraudulent conveyances (5); 2dly, those which have been

*Two species of fraudulent conveyances.*

(1) Com. Dig. "Bankrupt," C. 2.

(2) *Cole v. Davies*, 1 Ld. Raym. 724.

(3) *Inglis v. Grant*, 3 T. R. 530. *Norden v. James*, Dick. 533.

(4) *Whitwell v. Dimsdale*, Roke, 168. *Whitwell v. Thompson*, 1 Esp. 68. *Jolly v. Wallis*, 3 Esp. 228. *Martin v. Pcutress*, 4 Burr. 2477. *Dutton v. Morrison*, 17 Vea. 202.

(5) 13 Eliz. c. 5.

*Fraudu-  
lent con-  
veyance.*

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considered fraudulent as an evasion of the Bankrupt law, by distributing the trader's property in a mode, and in proportions, different from what that law permits. And, indeed it has been said, that *every case*, of an act of bankruptcy *by deed*, proceeds upon the ground of its being a fraud upon the bankrupt law. (1)

Convey-  
ances void  
at law.

With respect to the first class of conveyances, it would be far beyond the limits of the present treatise to enumerate the various cases that come within it, and which must necessarily depend each upon its own peculiar circumstances. It must suffice on the present occasion to observe, that suspicion always attaches to a deed which is executed in a *clandestine manner*, or at an *unseasonable hour*; to one which is *falsely dated*, or contains *unusual covenants*, or is made *without consideration*, or where, being an assignment of goods and chattels, it is *not accompanied by the delivery* of them to the assignee. For further information on this head, the reader is referred to the numerous cases in the books, some of which are mentioned in the note. (2)

Convey-  
ances void  
under the  
*bankrupt*  
law.

To the second class of conveyances, therefore, it is proposed chiefly to confine our attention; namely, those which are held void as being in contravention of the *Bankrupt law*, and which, if made by any other person than a trader, would not be considered fraudulent or void. For a conveyance by a man who is not in trade, either of *all* his property for the benefit of his creditors (3), or an assignment of *part* to one creditor in preference to an-

(1) *Rust v. Cooper*, Cowp. 629.

(2) *Edwards v. Harben*, 2 T. R. 587. *Wordall v. Smith*, 1 Camp. 333. *Bucknall v. Roiston*, Prec. Chan. 287. *Lord Cadogan v. Kennett*, Cowp. 432. *Haselinton v. Gill*, 3 T. R. 620, n. 10 Ves. 145. *Kidd v. Rawlinson*, 3 Esp. 52. 2 B. & P. 59. *Meggott v. Mills*, 1 Ld. Raym. 286. *Cole v. Davis*, Ibid. 724. *Dewey v. Bayntree*, 6 East,

251. *Jones v. Dwyer*, 15 East, 21. *Leonard v. Baker*, 1 M. & S. 251. *Watkins v. Birch*, 4 Taunt. 823. *Reed v. Blades*, 5 Taunt. 212. *Hartley v. Smith*, Buck. 368. And see also Sir W. Evans's Compendium of the Law upon the Statutes of Fraudulent Conveyances.

(3) *Pickstock v. Lyster*, 3 M. & S. 371. *Goss v. Neale*, 5 Moore, 19.

other (1), are not in themselves void, except as they are opposed to the policy of the Bankrupt law.

Under the former statutes it was originally decided, that in order to construe a conveyance of a trader's lands or effects to be an act of bankruptcy, it must have been a conveyance of *all* (2) his lands, or effects, — or of so great a portion of the latter, — that it would not be possible for him afterwards with the remainder to carry on his business (3); for it was held that he might lawfully make a mortgage of *part* of his lands, or assign *part* of his effects with possession delivered, to any particular creditor, without its being deemed fraudulent, or an act of bankruptcy. (4) If any *part* of his estate or effects was *excepted* in an assignment, which purported to be an assignment of *all*, — then the question was, whether the exception was colourable or not. (5) This construction was consistent with the enactment of the statute then in force relating to this particular act of bankruptcy, — the words of the 1 Jac. 1. c. 15. s. 2. being “any fraudulent grant or conveyance of his, her, or their lands, tenements, goods, or chattels;” and not, as in the present statute, “any fraudulent grant or conveyance of *any* of his lands, &c.” Another and more modern class of cases extended this rule of construction, by holding that, where the effect of an assignment would be to prevent a fair and equal distribution amongst the creditors, — then the assignment of only *part* of the effects, and though made to a *bond fide* creditor, yet if made in contemplation of bankruptcy, became itself the very act (6); for, though not a conveyance of *all* his effects, it was nevertheless, as to the *part* actually conveyed, a means whereby his other creditors might be defeated or delayed; and this last mode

*Fraudulent conveyance.*

Former doctrine as to fraudulent conveyances.

Distinction between the present and the former enactment.

(1) *Estwick v. Caillard*, 5 T. R. 424. *Inglis v. Grant*, Ibid. 530. *Nunn v. Wilmore*, 8 T. R. 528. *Mear v. Howell*, 4 East, 1.

(2) 1 Burr. 467.

(3) Doug. 282. 1 Bl. 362. *Low v. Skinner*, 2 Bl. 906.

(4) *Wilson v. Day*, 2 Burr. 850.

(5) *Gayner's case*, 1 Burr. 477.

(6) Cowp. 124. *Linton v. Bartlett*, 3 Wils. 47. *Devon v. Watts*, Doug. 86. *Whitwell v. Thompson*, 1 Esp. 68.

*Fraudulent conveyance.*  
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of construction is consistent with the words and the spirit of the present enactment. As the law now stands, therefore, any grant or conveyance of *any portion* of a bankrupt's property, which may give an undue preference to any particular creditor,—or which, in the words of the statute, may be made “with intent to defeat or delay his creditors” generally,—will be considered an act of bankruptcy; the material thing for consideration being, the *intent and purpose* of the bankrupt in making the grant or conveyance.

Assignment of  
 all the  
 effects,  
 when an  
 act of  
 bankruptcy.

But, *first* — as to those cases where a trader conveys the *whole* of his effects.

A Grant or Conveyance of the *whole* of a trader's property, which may be valid as between the bankrupt and the other party to it, may be fraudulent by reason of collusion or deceit on the part of the trader, and its tending to the injury of his other creditors; as where he *continues in possession* of the property assigned,—by which means he obtains a false credit among those who deal with him. Thus where a trader assigned *all* his estate and interest in certain premises, and also all his stock in trade to a particular creditor, for the purpose of securing him the repayment of advances, at the same time *remaining himself in possession* of every thing conveyed by the deed, and having in fact nothing of value, but what was comprised therein,—he was held to have committed an act of bankruptcy. (1)

So where a trader, finding he could not stand his ground, assigned to one of his creditors *every thing he had in the world*, to secure an unliquidated debt, *keeping possession* of the property, and giving a letter of attorney to his *own clerk* to collect in the debts,—the Court, after observing that the deed was made to *prefer* the assignee to the trader's other creditors, and that his own clerk was invested with the management of his effects, instead of the commissioners, decided that he became a bankrupt the moment he exe-

(1) *Worsley v. De Mattos*, 1 Burr. 467.

cuted the deed. (1) And the same point was ruled, where a trader executed a bill of sale of *all* his effects to a creditor, though he was put into possession of them the next day. (2)

*Fraudulent conveyance.*

Neither does it render such an instrument less an act of bankruptcy, that it is given by the trader, when under arrest at the suit of the very creditor, to whom it is so made or given. (3) Nor though the creditors, (with whom such deed was in the first instance concerted,) afterwards, and when it is executed, change their purpose, unknown to the bankrupt, and procure a commission to be issued against him, founded on the very deed as the act of bankruptcy. (4)

When under arrest.

And it makes no difference, whether the assignment is made to secure a present debt, or to *indemnify a surety*, who is only likely to become a creditor; for the mischief arising to the bankrupt's other creditors from the undue preference, is precisely the same. As where the bankrupt had borrowed of a creditor a sum of money, for the payment of which the defendant became surety in a bond, and the bankrupt conveyed to the defendant *all* his estate and effects, and stock in trade, and a *nominal possession* was given by delivery of a silver spoon, there being a proviso in the deed, that until the defendant was damnified, he should not take actual possession—this was decided to be an act of bankruptcy, though the bankrupt continued solvent for three years after the conveyance; on the ground, that it was intended to give an *undue preference* to the surety, when he became a creditor—and that the conveyance, being of all his stock in trade, destroyed in reality his capacity of trading—for he could not afterwards fairly sell an ounce of merchandize, the whole belonging to another person. (5) And an exclusion of only *one* creditor from the benefit of such an assignment, will not prevent its being

Assignment to indemnify a surety.

Where one creditor,

(1) *Wilson v. Day*, 2 Burr. 927.

(4) *Tappenden v. Burgess*, 4 East,

(2) *Butcher v. Easta*, Doug. 282.

230.

(3) *Newton v. Chantler*, 7 East,

(5) *Hassells v. Simpson*, Doug.

138.

89. 1 Brown, 99.

*Fraudulent conveyance.*

or part of effects excepted.

considered an act of bankruptcy, in the same manner, as if such creditor had been preferred to the rest; neither would a colourable exception in the deed of an inconsiderable part of the trader's property, prevent its being so considered—as where a trader made an assignment of the bulk of his property (except his household goods and some other articles,) to trustees in trust, to pay themselves and all the creditors mentioned in a schedule, in which schedule one creditor was purposely omitted—Lord Hardwicke was clear that the assignment was an act of bankruptcy. (1)

The above cases, we perceive, relate to assignments for the benefit of *one or more* creditors to the *exclusion* of others; and as the necessary consequence of such a transaction is to give an *undue preference*, it seems but just and reasonable that an assignment of this nature should be held fraudulent against those creditors, who are excluded from the benefit of it. The following decisions, however, invalidate assignments for the *benefit of all* the creditors, the justice of which it is not so easy to comprehend (2); though the professed principle on which they proceed is, that the insolvent's property may be more effectually administered for the good of the creditors under the provisions of the Bankrupt law, than under the management of trustees privately selected for that purpose by the party himself. (3)

Assignment for the benefit of all the creditors not an act of bankruptcy, unless a commission issues within six months.

And here it may be as well to notice an important restriction which is added by the present statute to this act of bankruptcy. By the 4th section it is provided, where the conveyance is by deed to trustees for the benefit of *all* the creditors, that it shall not be deemed an act of bankruptcy, unless a commission issue within six calendar months from the execution of it—provided the deed is executed by every trustee within fifteen days after the execution of it by the trader—and the execution, both by the trader and the trus-

(1) *Ex parte Foord*, cit. 1 Burr. 477.

(2) 14 Ves. 148. 17 Ves. 198.

(3) See some forcible observ-

ations upon this subject, by Sir W. D. Evans, in his letter to Sir S. Romilly, page 173.

tees, be attested by an attorney or solicitor—and notice be given, within two months after the execution, by the trader (if he reside in London, or within forty miles thereof) in the London Gazette, and in two London daily newspapers; and if he reside beyond that distance, then in the Gazette, and one London daily newspaper, and one provincial newspaper published near to the trader's residence; which notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

*Fraudulent conveyance.*  
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This clause will remove several difficulties previously connected with trust deeds for the benefit of creditors—which could be avoided formerly at any time, as an act of bankruptcy, by an outstanding creditor, not a party to the deed; under such a deed, therefore, no purchaser was ever safe; for he could never be sure that *all* the insolvent's creditors had executed the deed.

An assignment of a trader's effects, however, for the benefit of *all* his creditors, will only be an act of bankruptcy, when they do not *all* assent to the deed; for no creditor, who is either a party or privy to the assignment, or has even acted under it, can afterwards set it up as an act of bankruptcy (1); though this estoppel only applies to such party as *petitioning creditor*, and not to one who happens to be elected an assignee under the commission. (2)

Not if *all* the creditors assent.

The first case involving the consideration of an assignment for the benefit of *all* the creditors, was decided by Lord Mansfield—in which he held, that such an assignment made by a trader to two of his creditors in trust for themselves and the rest, was an act of bankruptcy, unless *every*

(1) *Banford v. Baron*, 2 T. R. 594. n. *Ex parte Cawkwell*, 1 Rose, 313. *Ex parte Whalley*, 1 P. Smith, 118. *Ex parte Crawford*, 1 Christ. B. L. 137. 182. *Back v. Gooch*, 1 Holt, 13. 4 Camp. 232. *Hicks v. Burfitt*, *Ibid.* 235 n. *Ex parte See*, 1 Mad. 598. 1 G. & J. 84. *Ex parte Kilner*, Buck. 104. *Ex*

*parte Battier*, *Ibid.* 426. But a party is not prevented from suing out a commission upon a *different act of bankruptcy* committed by the trader previously to, and entirely independent of the deed. *Doe v. Anderson*, 1 Star. 262.

(2) *Tappenden v. Burgess*, 4 East, 230. *Jackson v. Irwin*, 2 Cowp. 49.

*Fraudulent conveyance.*  
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Conditional assignment.

Where one partner omits to execute.

When drawn up contrary to instruction.

Assignment made in India.

creditor had concurred (1); and, in conformity with this decision, it was afterwards held, that where several partners by deed assigned *all* their partnership effects, &c. to trustees for the benefit of their creditors, and some of the *separate* creditors of one of the partners did not assent to it, the assignment, as to such partner, was an act of bankruptcy. (2) And a condition inserted in such a deed, that it shall be void if the parties think fit (3), or if a commission of bankruptcy be taken out, or if all the creditors do not sign within a given period (4) — will not make it less an act of bankruptcy. Where such an assignment, however, purports to be made by several partners, and one of them never executes the deed — it is very doubtful, (unless the deed was expressly meant to be a several deed,) whether in this case, the assignment would be an act of bankruptcy, even against the partner who executes it; for he might not intend to give the deed any effect, unless the other partner also devoted his share of the partnership property for the purposes of the assignment — which he does not do, in fact, if he fails to execute the deed. (5) And an assignment of a trader's effects, which is not drawn according to the instructions given to his attorney to prepare it, cannot be set up as an act of bankruptcy; for it is not *his deed*, when it is drawn up contrary to his intention. (6)

An assignment, however, made by a trader, resident in India, of *all* his effects, in trust for creditors, in certain proportions agreed upon by all parties there, has been held to be not an act of bankruptcy — the transaction being perfectly fair at the time, and without any fraudulent intention. (7)

(1) *Kettle v. Hammond*, 1 C. B. L. 89.; and see *Harman v. Fisher*, Per Lord Mansfield, Cowp. 125.

(2) *Eckhardt v. Wilson*, 8 T. R. 140.

(3) *Tappenden v. Burgess*, 4 East, 250.

(4) *Dutton v. Morrison*, 1 Rose, 215. 17 Ves. 199.

(5) *Ibid*, 215. Per Lord Eldon.

(6) *Ex parte Norris*, 1 G. & J. 253.

(7) *Inglis v. Grant*, 5 T. R. 530. This seems somewhat irreconcilable with many of the former decisions — but there was another ground for the decision in this case, which would not now apply, viz. that the trader, being in India at the time of the execution of the



*Secondly*—Where a trader assigns, or conveys, only *part* of his property.

Some few of the older cases seem rather opposed to the doctrine, that an assignment of only *part* of a trader's effects amounted to an act of bankruptcy (1); but they have been completely overruled by subsequent decisions, all of which lay down on this subject one uniform rule; namely, that a conveyance, either of *all*, or *part*, of an insolvent's property in favor of fewer than all the creditors, is an act of bankruptcy; because it is the means whereby creditors *may be* defeated or delayed. But an assignment of part of the effects is only considered fraudulent, when made in *contemplation of bankruptcy*; for a *solvent* trader has a right to make over any portion of his property that he chooses, either in satisfaction of a debt, or for any other purpose. (2) It is only, therefore, when his circumstances are such as must render him unable to pay all his creditors their demands in full, that an assignment of *part* of his effects to any one creditor can be considered, with *intent* to give that creditor an *undue preference* over the rest; and as this is contrary to the whole spirit and meaning of the Bankrupt law, it is now held, not only void as against the other creditors, but also an act of bankruptcy in itself.

Therefore, where a trader, being in insolvent circumstances, borrowed 120*l.* of his brother, and in consideration of this loan assigned to him one-third part of all his effects, and absconded two days after the assignment—though the brother took immediate possession of the goods, and exercised clear acts of ownership by exposing them to sale, and carrying on the trade, and had not the least knowledge of the insolvency—the Court, notwithstanding they acknow-

*Fraudulent conveyance.*

Assignment of part of effects;

only fraudulent when in contemplation of bankruptcy.

Instances where such a deed held fraudulent.

assignment, was not in a situation in which the Bankrupt laws of *this* country could have any operation either upon him or his property. A deed, though *executed abroad*, may now, however, under the 3d section

of the new statute, be construed an act of bankruptcy.

(1) *Small v. Oudley*, 2 P. Wm. 427. *Hooper v. Smith*, 1 Bl. 441. *Cock v. Goodfellow*, 10 Mod. 480.

(2) *Jacob v. Shepherd*, 1 Burr. 478.

*Fraudu-  
lent con-  
veyance.*

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ledged it to be a hard case upon the brother, decided that the deed, by reason of the *preference*, was fraudulent and void; and added, that if they were to let such a deed stand, they should tear up the whole Bankrupt laws by the roots. (1) So where a trader, being pressed by a creditor for payment, conveyed estates in trust to sell and pay the creditor, with a further trust to pay debts to certain relatives — this was considered an *undue preference* of those relatives, and, as such, an act of bankruptcy. (2) So where a man, after agreeing to have a commission of bankruptcy sued out against him, and who could only pay 8s. in the pound, assigned a lease to three of his creditors, to secure the payment of money due to them, and then in trust for himself — the assignment was held fraudulent and an act of bankruptcy, because done in immediate contemplation of becoming a bankrupt. (3) So, also, where a banker, being *insolvent*, conveyed part of his real and personal estate to his son, who had in fact entered into engagements for, and advanced money to his father, in amount more than the value of the estates, and who took possession of the property immediately on the execution of the deed — Lord Mansfield laid it down as clear law, that if in contemplation of bankruptcy a man conveyed to the fairest creditor that ever existed — though the deed would not be fraudulent as *between them* — yet as it tended to defeat the Bankrupt law, by giving a *preference* to one creditor, it was a fraud upon the rest, and, consequently, an act of bankruptcy. (4) And even where a trader continued to carry on his trade for three years after the execution of a conveyance of *part* of his property in favour of particular creditors, and the conveyance itself remained in the possession of the bankrupt — it was held to be a question for a jury to consider, whether such a conveyance was not fraudu-

(1) *Linton v. Bartlet*, 3 Wils. 47.;  
and see Cowp. 124.

(2) *Morgan v. Horseman*,  
3 Taunt. 241.

(3) *Devon v. Watts*, Doug. 85.

(4) *Round v. Hope Byde*, 1 C.B.

L. 94. *Whitwell v. Thompson*,  
1 Esp. 68.

lent, as being voluntarily made, and in order to give an *undue preference* to the prejudice of the general creditors. (1)

*Fraudulent conveyance.*

It was discussed in one case (2), whether a settlement made by a trader previous to and in contemplation of marriage, was fraudulent against creditors; but there is no express determination on the subject; though, if the wife was clearly proved to be a party to any intent to defeat or delay the creditors—such a settlement would then of course be considered fraudulent as to the wife, and an act of bankruptcy on the part of the husband. (3)

*Quære, as to marriage settlement.*

But, though an assignment of any *part* of a trader's effects will be fraudulent, if made in contemplation of bankruptcy, and with a view to prefer one creditor to another, yet if made *bonâ fide* for a just debt, and without contemplating that event—it will then neither be void, nor an act of bankruptcy. As where a merchant, *several months before* his bankruptcy, assigned specific goods in the hands of his factors to a particular creditor, in trust for himself and certain other creditors, and the trusts of the deed were immediately and openly carried into execution—this assignment was held to be no act of bankruptcy. (4) So the assignment of several debts mentioned in a schedule annexed to the assignment, to indemnify the sureties of the assignor, was held good—he not becoming a bankrupt till a month afterwards, and not having his bankruptcy in contemplation at the time of the assignment. (5)

*When assignment of part not fraudulent.*

And though, as we have seen, the *remaining in possession* of the property after the assignment is, *primâ facie*, evidence of fraud (6)—yet, when such possession is given to the creditor as the nature of the case will admit, that will remove all fraudulent imputation. For in many cases—as where goods are bulky, or in a place of distant deposit—

(1) *Pulling v. Tucker*, 4 B. & A. 382.

(4) *Jacob v. Shepherd*, 1 Burr. 478.

(2) *Campion v. Cotton*, 17 Ves. 268.

(5) *Unwin v. Oliver*, 1 Burr. 481.

(3) *Ex parte Rutherford*, cit. 17 Ves. 268. *Ex parte Mayor*, 1 Mont. Dig. note A.

(6) And see post. "Reputed Ownership."

*Fraudulent conveyance.*  
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there cannot be an actual transmutation from hand to hand ; and a delivery of a symbol of ownership will then be sufficient. Thus, where an engineer was employed by a Canal company to build locks and bridges, and purchased timber and other materials for that purpose (with money advanced him by the company) which were laid on the banks of the canal, and on the company advancing him more money to pay some of his debts, he executed a *bill of sale* to them of such timber and materials, and delivered to them a copper halfpenny as a symbol of transfer—it was held that the *bill of sale* was not an act of bankruptcy, it being in reality intended for the benefit of his other creditors—as it was given by him in consideration of an advance of money made for the purpose of enabling him to pay them, and carry on his business. (1) So where a trader conveyed freehold property to trustees, for the purpose of raising money, in order that he might meet all demands upon him with greater facility—such a conveyance was held not fraudulent, as there was *no contemplation* of bankruptcy at the time, and *no preference* or exclusion of any particular creditor ; and it was considered to be only disposing of an inconvenient property, the better to apply it to the purposes of his business, which would be for the benefit, and not to the prejudice, of his creditors. (2) And even where a trader was *insolvent* at the time of such a conveyance, it was held to be no act of bankruptcy, where *no fraud* was imputed, and there was no design to put the property in a train of distribution different from that of the Bankrupt law. (3)

Must be a conveyance *by* a trader, not to him.

The Grant or Conveyance intended by the statute, is a grant or conveyance *by* a trader of his *own* property—and not of property conveyed by another person *to*, or *in trust for him*. Therefore, where a trader is a party to a fraudulent assignment, and expects to derive benefit from

(1) *Manton v. Moore*, 7 T.R. 67.

(3) *Barney v. Vyner*, 1 B. & B.

(2) *Barney v. Davison*, 1 B. & B. 482.  
 B. 408. 4 Moore, 126. Ibid. 322.

it as assignee—though it is an act of bankruptcy in the assignor, and also void as to the assignee—yet it is not, in regard to the latter, an act of bankruptcy. As where A. and B., being partners, and insolvent,—A. assigned certain property to B., in trust for the wife of B. (who was A.'s daughter)—it was held to be no act of bankruptcy by B., notwithstanding he was a party to the deed. (1)

*Fraudulent surrender or gift.*

Where the Grant or Conveyance relied on as the act of bankruptcy, cannot be produced before the commissioners, they may receive *parol evidence* of its contents (2); and if the party, in whose possession it is, refuses to produce it, they have now, by the 34th section of the new statute, authority to commit him for such refusal. (3)

*Parol evidence.*

12. *Making, or causing to be made, any fraudulent Surrender of any of his Copyhold lands or tenements.* This is a new act of bankruptcy created by the present statute, and very properly introduced into it, to remedy an inconvenience in the construction of the former Bankrupt laws—under which it was held, that as no process of execution can issue to levy a debt upon a *copyhold* estate, a *surrender of copyhold* property, therefore, however fraudulent, was not an act of bankruptcy—since it could not be said to defeat or delay creditors, who had no means at law of touching that description of property. (4)

*Fraudulent surrender of copyholds.*

The same rules of construction as to the *fraud* of the transaction, and the *intent*, will of course apply to this, as to the two preceding acts of bankruptcy.

13. *Making, or causing to be made, any fraudulent Gift, Delivery, or Transfer of any of his Goods or Chattels.* This is also a new act of bankruptcy created by the statute, and removes a great inconsistency that formerly prevailed in the Bankrupt law. For, though a fraudulent gift or transfer *by deed* was held an act of bankruptcy, it was decided,

*Fraudulent gift or transfer.*

(1) *Whitmell v. Thompson*, 1 Esp.

(3) *Ex parte Treacher*, Buck. 17.

68.

(4) *Ex parte Cockshott*, 3 Bro.

(2) *Ex parte Cawkwell*, 19 Ves. 502. 1 C. B. L. 162.

234.

Fraudulent gift.

that a sale, or any transfer of goods, *not by deed*—however fraudulent the scheme might be in preference of one creditor to another, and as such void—was nevertheless not an act of bankruptcy. (1) The rules of construction referred to under the last head, will likewise equally apply to this.

The *Gift, Delivery, or Transfer* intended by the statute, is one that is either fraudulent at *common law*—or fraudulent as being made in *contemplation of bankruptcy*; and, as every transfer of this latter description amounts to a *fraudulent preference*, the reader is referred to a subsequent part of this work for the law on that subject, where all the decisions are collected. (2) Any assignment, or transfer of property, also, by an insolvent trader to any of his children (except upon their marriage), or to any other person, within the terms of the seventy-third section of the new statute, will fall, it is apprehended, under this act of bankruptcy.

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The above are all the acts of Bankruptcy, where the *intent* of the party is a main and principal ingredient in the composition of the act; the remainder are perfectly independent of any intention of the trader, being deemed *of themselves* sufficiently indicative of his insolvency; so as to render him a fit subject for a commission of bankrupt.

Lying in prison.

14. *Having been arrested, or committed to prison for debt, or on any attachment for non-payment of money, and thereupon, or upon any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lying in prison for twenty-one days; or having been arrested or committed to prison for any other cause, and afterwards lying in prison for twenty-one days, after any detainer for debt lodged against him and not discharged.*

The *period* of lying in prison, it will be observed, is

(1) *Martin v. Peutress*, 4 Burr. 2478. Doug. 87.

(2) See post. "Assignment," part 2. sect. 6.

considerably shorter than that required by the former Bankrupt law—which was first six (1), and afterwards reduced to two (2) months—and seems in all respects a very proper alteration. For a trader may reasonably be held insolvent, whose credit is so bad, that after being arrested for debt, he cannot, in the course of *three weeks*, either find money to settle the demand, or prevail upon some persons to be bail for him in the action; and if, on the contrary, he is *able* to do so—then his neglect cannot be supposed to arise from any thing less than a fraudulent intention; in either of which cases it is high time for the creditors to look to themselves, and compel a distribution of his effects.

*Lying in  
prison.*

The *arrest*, in order to become the date from which the imprisonment is reckoned, must be in all respects a *lawful* arrest. An arrest, therefore, which in its *inception* is strictly *unlawful*, and which only becomes lawful by subsequent relation, is not such an arrest as is required by the act. Thus, though an executor *may* before probate arrest a debtor to the estate, and is justified in so doing if he afterwards proves the will, and takes out letters of administration (3)—yet, if the defendant on such an arrest should continue in prison the whole 21 days mentioned in the statute, this would not be held to be an act of Bankruptcy; for though the arrest becomes good as between the parties by the relation of the subsequent grant of probate, yet, being bad in law before such grant, it shall not be allowed to prejudice third persons, who are no parties to the suit. (4) And the Bankruptcy of such a defendant (even if he should remain in prison a sufficient time after probate to be made a bankrupt) will not be held to relate back to the first arrest, so as to defeat a subsequent payment made by him before probate to another creditor for a just debt. (5)

Arrest  
must be  
lawful in  
its incep-  
tion.

The *arrest* must also be for a *debt legally due* and de-

Must be  
for a pre-  
sent debt.

(1) 1 Jac. 1. c. 15.

(2) 21 Jac. 1. c. 19.

(3) Roll. Abr. 917.

(4) *Duncomb v. Walter*, 3 Lev. 57. 1 Ventr. 270. T. Raymd. 499. Skin. 22. 87.

(5) 3 Lev. 57.

*Lying in  
prison.*  
—

Not on an  
equitable  
contract.

For pe-  
nalty due  
to the  
crown,  
sufficient.

When bail  
put in, and  
render  
after-  
wards.

mandable. Therefore an arrest on a bond *before the day of payment*, in order to oblige the debtor to find sureties according to the custom of London, is not a sufficient arrest within the meaning of the statute; for *no debt is due* at the time of such an arrest. (1) Neither is an arrest in an action at law on a contract—the only remedy to enforce the performance of which is by a *bill in equity*—a sufficient arrest on which this act of Bankruptcy can be supported (2); though any arrest or attachment for non-payment of money is now, we perceive, made sufficient by the statute. And a detention in prison for a *penalty due to the crown* is, also, considered a lying in prison for debt within the meaning of the statute. (3)

The statute, it will be observed, does not make the *mere arrest* an act of Bankruptcy,—for the most respectable and solvent merchant is liable to that inconvenience. But the presumption of insolvency arises, from his lying in prison 21 days without being able to get bail. And this presumption will not be rebutted by mere *formal bail* being put in, for the purpose of changing from one custody to another. Therefore a man arrested in Kent, and brought up to London to be bailed, and immediately turned over to the King's Bench prison, was held a bankrupt from the time of the first arrest. (4) Where a defendant, however, put in good and sufficient bail to the action, and afterwards rendered himself to prison in discharge of his bail, it was a doubtful point under the old law, whether the bankruptcy would relate back to the time of the first arrest, or only to the time of the surrender (5); though Lord Mansfield thought, when bail was really put in, that the bankruptcy only related to the time of the surrender. (6) The former statute indeed, 21 Jac. 1. c. 19., expressly declared,

(1) Green, 64. Billing, 96. Good, 26. 1 C. B. L. 94.

(2) Ex parte Hylliard, 1 Atk. 147. 2 Ves. 487.

(3) Cobb v. Symonds, 5 B. & A. 516.

(4) Rose v. Green, 1 Burr. 437.

(5) Cane v. Coleman, 1 Salk. 109.

Smith v. Stracy, Ibid. 110. Hill v. Skish, 2 Show. 512. Bull. N. P. 38.

Trice v. Webber, cit. 1 Burr. 458.

(6) 1 Burr. 439.



that in the case of *lying in prison* for debt, the defendant should be "accounted a bankrupt from the time of his first arrest." But the present statute says nothing about *the time from which* the imprisonment is to be computed (1); and therefore, it is apprehended, that whether a man gives bail or not, he must now in all cases *actually remain in prison* for the space of 21 days, in order to be found a Bankrupt. And it may perhaps be a question in the construction of the present statute—as no notice whatever is taken of the time *from which* the bankruptcy shall be reckoned—whether, after the expiration of the 21 days, the Bankruptcy will *relate back* to the first day of imprisonment, or merely to the day when the 21 days expire. There is certainly no *complete* act of Bankruptcy until the full expiration of that time—though it may be said to be inchoate after the imprisonment has once begun, for then the party is in fact in the progressive course of committing an act of bankruptcy.

*Lying in prison.*

Doubtful as to relation back to the arrest.

Whether or not, however, this act of Bankruptcy, when completed by the term of imprisonment, may be held now (as it was before (2)), to relate back to the first day of arrest—it is perfectly clear, that no commission can be sued out upon it till the twenty-one days completely expire; for no subsequent lying in prison will give effect to a previous commission. (3) But it would be no objection, that the requisite time had not expired when the docket was struck; provided it was expired before the issuing of the commission. (4)

Period of imprisonment must expire before commission;

but need not before docket.

Where a party, in prison at the suit of one plaintiff, is detained at the suit of another, and after such detention, lies the requisite time at the suit of the second, though

Where a party detained by another creditor;

(1) This appears to be an accidental omission; for in mentioning the next act of bankruptcy, viz. "escaping from prison," the statute expressly declares, that the commission of that act of bankruptcy shall be deemed to be "from the time of the arrest, commitment, or detention."

(2) *Rose v. Green*, supra. *King v. Leith*, 2 T. R. 141.

(3) *Gordon v. Wilkinson*, 8 T. R. 507.

(4) *Wydown's case*, 14 Ves. Ex parte *Dufresne*, 1 V. & B. 51. 2 *Rose*, 353.

*Lying in prison.*

Need not be a public prison;

the imprisonment must be continuous.

When committed upon a criminal charge.

discharged as to the first—this is, of course, within the statute. (1)

The word "*prison*" does not necessarily mean the county gaol, or any of the public prisons—but it will be sufficient if the defendant, after being arrested, continues in *actual custody* the whole of the 21 days. Therefore where a man was so ill in bed, that he could not be removed without endangering his life, and was allowed by the officer, who arrested him, to remain for some time in his own house, and was afterwards carried to gaol, where he remained till the expiration of the full time from the date of his first arrest—this was held a sufficient lying in prison to constitute an act of bankruptcy. (2) And though the party has the benefit of the *day rules* of the prison—it is equally an act of bankruptcy; for the principle, on which *this* act of bankruptcy is founded, is, that it is evidence of insolvency. (3) If a defendant, however, on being arrested, is allowed to *go at large*, and then returns to custody—the act of bankruptcy has, in that case only reference to the latter event; for the period of imprisonment required by the statute must be *continuous and unbroken*. (4)

There was some doubt entertained formerly, whether when a trader was committed to prison on a *criminal charge*, and was afterwards charged in an action for debt, his lying in prison the stated time after such detainer, constituted an act of bankruptcy—the original commitment being under a criminal sentence. (5) But it was afterwards determined, that such lying in prison amounted to an act of bankruptcy; and this though he might be discharged from the criminal process without his knowledge. (6) The words, however, of the new statute now remove all doubt upon this point, as it is immaterial whether he is in the

(1) *Coppendale v. Bridgen*, 2 Burr. 814.

(2) *Stevens v. Jackson*, 1 Marsh, 469. 6 Taunt. 106.

(3) 1 Carringt. N. P. Rep. 401.

(4) *Barnard v. Palmer*, 1 Camp. 309.

(5) *Ex parte Bowes*, 4 Ves. 168.

(6) *Rex v. Page*, 1 B. & B. 308. 3 Moore, 656. 7 Price, 616.

first instance committed to prison for debt, or “for any other cause.” *Breaking prison.*

In the computation of the period of imprisonment, the day of being committed to prison, or of the arrest — if the party thereupon goes to prison (1) — is to be reckoned the first of the 21 days; and the time is not completed until the expiration of the whole of the last day. (2) *How imprisonment to be computed.*

15. *Escaping out of Prison, or Custody, after having been arrested, COMMITTED (3), or DETAINED (3) for debt.*

This act of bankruptcy is founded on the same principle as the last; for no man would break prison, that was able and desirous to procure bail. The observations, therefore, under the last head of bankruptcy, as to the *legality of the Arrest*, apply in an equal degree to this; unless the *arrest, committal, or detainer*, is strictly lawful in every respect, the subsequent escape will not be an act of bankruptcy.

By the former statute (the 21 Jac. 1. c. 19.) the *arrest* must have been for not less than the sum of 100*l.*; but the present statute comprehends every arrest for debt, whatever the *amount* of the debt may be for which the trader is arrested. *As to the amount for which arrest made.*

The *Escape* intended by the statute is such an one, as plainly evinces the intention of the debtor to run away, and thereby to defeat his creditors; and it must be an escape *against the will* of the officer in whose custody he is, and not an escape by implication; for this being considered a criminal act in the eye of the law, a man shall not be made a criminal, when he has no intention to commit a crime. Therefore, if a trader is arrested in Kent, and, being brought to town in custody of the sheriff's officer, is permitted by him to call at his attorney's house in the city, and from thence is immediately carried to the Judge's chambers, in obedience to a writ of *habeas corpus*; — this would not be such an escape as is contemplated by the *Must not be an escape by implication.*

(1) *Saunderson v. Gregg*, 3 Star. 72.

(2) *Glassington v. Rawlins*, 3 East, 407.

(3) These words are new.

*Fraudulent composition.*

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VATELY *received*, more in the pound than the other creditors. In the present statute the word "*privately*" is omitted; and the *probability*, or even the *possibility*, of the petitioning creditor receiving, under such compact with the bankrupt, more in the pound than the other creditors, will be enough now, without any *actual receipt* of money, to establish this act of bankruptcy.

Penalty on the petitioning creditor.

A commission issuing upon such a docket may, however, be either proceeded in, or superseded, as the Lord Chancellor shall think fit; in which latter case a new commission may issue, either upon this or any other act of bankruptcy. The petitioning creditor, as a penalty for such compounding, forfeits his whole debt; and may also be compelled to repay or deliver up the money or security he has received, or the full value thereof, to such person as the commissioners shall appoint, for the benefit of the creditors of the bankrupt. (1)

*Filing a petition to take the benefit of the insolvent act.*

18. *Filing a petition to take the benefit of the Insolvent Act.* This act of bankruptcy is not specified among those enumerated by the present statute (2); but it is made one by the late insolvent act, 7 Geo. 4. c. 57. s. 13., and the last, it is now presumed, of those innumerable and contradictory laws, which have been permitted year after year to crowd the latter volumes of our statute book. (3) The requisites to constitute this act of bankruptcy are, first, that the person shall be in *actual custody* at the time of filing the petition; secondly, that such person shall be *declared bankrupt* before the time advertized in the Gazette, and appointed by the Insolvent Court, for hearing the matters of the petition, or within two calendar months from the filing of the same. It is also declared, that the commission issuing upon this act of bankruptcy shall, after such adjudication, within the above mentioned period, but

(1) Ex parte *Thompson*, 1 Ves. 157. Ex parte *Paxton*, 15 Ves. 464. Ex parte *Brown*, Ibid. 473. Ex parte *Brine*, Buck. 19. 108.

(2) It was, however, included among the acts of bankruptcy in the 5 G. 4. c. 98. s. 5.

(3) See ante, p. 44., note.

not before, have the effect of avoiding any conveyance and assignment of the estate and effects of such person under the insolvent act. And the act of bankruptcy is to be accounted from the time of filing the petition.

*Members of parliament.*  
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19. With respect to *traders having Privilege of Parliament*, it is enacted by the 9th section of the new statute, that if any such person commit any of the acts of bankruptcy before enumerated, a commission of bankrupt may issue against him, and be proceeded with in like manner as against other bankrupts; save only, that he is not liable to be *arrested or imprisoned* during the time of his privilege, except in cases by the act made felony. It is also enacted by the 10th section of the statute, that if any creditor of such a trader, to the amount requisite to support a commission, shall file an Affidavit (1) in any Court of record at Westminster that the debt is justly due to him, and that the debtor is such a trader, and shall sue out of the same court a *summons*, or an *original bill and summons*, — then, if such trader shall not within one calendar month after personal service of such summons, either pay, secure, or compound for the debt to the satisfaction of the creditor, or enter into a bond in such sum, and with two such *sufficient sureties*, as any of the Judges of the Court out of which the summons is issued shall approve of, conditioned to pay such sum as shall be recovered in the action, together with the costs; and also cause a proper appearance to be entered to such action; — every such trader shall in that case be deemed to have committed an act of bankruptcy from the time of the service of such summons; and any creditor may sue out a commission against him, and proceed thereon as against other bankrupts.

*Traders having privilege of parliament.*

*Proceeding by summons.*

In the proof of this act of bankruptcy, it must appear that the summons was taken out *after* the affidavit of debt was filed. And as some of the circumstances cannot be

*What evidence admissible of this act of bankruptcy.*

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*Members  
of parlia-  
ment.*

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*Creditors  
competent  
to a cer-  
tain ex-  
tent*

*Proceed-  
ing under  
a decree  
or order.*

proved but through the medium of a creditor, the *necessity* of the case will justify a departure, in some measure, from the general rule, that a creditor cannot be admitted to prove the act of bankruptcy; but then his testimony ought only to be received as to facts, of which evidence cannot be obtained from other sources. (1) Therefore, though the creditor may be permitted to prove that the debt has not been paid, secured, or compounded for to his satisfaction, — yet the circumstance of the bankrupt being a member of parliament, and a trader, must be derived from other witnesses. (2)

It is provided also by the 11th section of the act, that if any *decree, or order*, shall have been pronounced in any cause depending in Equity, or any order made in any matter of Bankruptcy, or Lunacy, against any trader having privilege of parliament, ordering such trader to pay any sum of money — and he shall disobey, after the same has been duly served upon him, — the person entitled to receive such money may apply to the court, by which the same shall have been pronounced, to fix a peremptory day for the payment of such money; and if, upon being personally served with such peremptory order eight days before the day appointed for the payment of the money, he shall neglect to pay the same, — he shall then be deemed to have committed an act of bankruptcy from the time of the service of the order; and every such creditor may also sue out a commission against him, and proceed as against other bankrupts.

(1) See post, "Evidence."

(2) Ex parte *Harcourt*, 2 Rose, 211.



## CHAP. IV.

## OF THE PETITIONING CREDITOR.

1. *Of the amount and nature of his Debt.*
2. *Of the time of the contracting and accruing of the Debt.*
3. *General duties and liabilities of the Petitioning Creditor.*

## SECTION I.

*Of the amount and nature of the Debt.*

By section 15. of the new act, the petitioning creditor's (1) debt (if one creditor or one firm petition,) must amount (2) to 100l.;—if two creditors petition, the amount of both debts must be 150l.;—if three or more, the amount must then be 200l. And though the debt be *not actually payable* at the time of the act of bankruptcy, yet if *credit* has been given to the bankrupt upon valuable consideration, it will be a good petitioning creditor's debt, whether he has any security in writing for it or not. (3)

Debt payable in futuro.

The debt must be a *legal* debt, and not an *equitable* one; therefore the *assignee of a bond* (a security which is not assignable at law) cannot be a petitioning creditor. (4) And where there is only *one* petitioning creditor there

Must be a legal debt,

(1) The statutes prior to the 5G.2. c.20. (with the exception of the 5Ann. c.22. which soon expired) did not require the commission to be issued upon the petition of a creditor.

(2) The 5Ann. c.22. was the first statute that regulated the amount of the petitioning creditor's debt.

(3) Under the construction of the former law (the 5G.2. c.30.

s.22.), a debt payable at a future day, unless there was a *written* security for it, would not constitute a good petitioning creditor's debt. *Parslow v. Dearlove*, 4 East, 438. *Hoskins v. Duperoy*, 9 East, 498. *Ex parte White*, 3 Ves. & B. 130. *Ex parte Feranda*, Buck. 35. *Price v. Niron*, 5 Taunt. 338.

(4) *Ex parte Hylliard*, 2 Ves. 407. 1 Atk. 147. *Medlicott's case*, 2 Str. 899. *Ex parte Lee*, 1 P.Wm. 782.

*Amount and nature of debt.*

—  
or a note on a wrong stamp.

out a commission upon the whole debt, notwithstanding he neglected to give notice to the drawer of the bill being dishonoured. (1) A *promissory note*, also, given on a *wrong stamp*, for a pre-existing debt, does not destroy the debt; and a commission may be supported in such case on the original debt; for the note in this case was not the foundation of the debt, nor necessary to be had recourse to in the proof of it, if it could be established by other evidence. (2)

Creditor by notes bought in.

A creditor by *notes bought in* at 10s. in the pound, it has been determined, is a creditor for the full sum, and may take out a commission as a creditor to that amount. (3)

Debt composed partly of interest.

A debt composed partly of the amount of a bill of exchange, and partly of *interest* calculated thereon, is not a good petitioning creditor's debt, unless such *interest be expressed in the body of the bill*; for *interest*, when it is not specified in the contract, forms no part of the debt at law, but is only given as *damages* for the detention of the debt. (4)

Banker's check,

And where the petitioning creditor had, upon an application for a loan from a bankrupt, delivered to him a check on his bankers for 100l., — which check had got back again to the hands of the petitioning creditor, as if satisfied, but the petitioning creditor was unable to give positive proof that the check was *actually paid*, — the check itself was held not sufficient evidence of a petitioning creditor's debt. (5)

Debt must not depend on a contingency.

The debt must also be a *present existing debt*, and not one depending on a *contingency*. A promissory note, therefore, given to a trustee under a marriage settlement, though it was in form a present debt, and payable on demand, yet as it was in fact only a security for a *contingent debt* under the settlement, which would not be payable unless the wife died before her husband — was held not a sufficient debt to support a commission against the maker of

(1) *Bickerdike v. Bollman*, 1 T. R. 405.

(2) *Ex parte Geddes*, 1 G. & J. 414., where it is said that the same rule holds with respect to a sequestration in Scotland; and see *Brown v. Watts*, 1 Taunt. 353.

(3) *Ex parte Lee*, 1 P. Wms. 782.

(4) *In re Burgess*, 8 Taunt. 660. 2 Moore, 745. *Ex parte Greenway*, Buck. 412. *Cameron v. Smith*, 2 B. & A. 305. *Ex parte Marlow*, 1 Atk. 150.

(5) *Bleasby v. Crossley*, 2 Carr. & P. 213.

transaction (†) — that is — where each partner is interested in *both the profit and the loss*. Therefore in a case where A. deposited goods with B. for sale, on an agreement that the profits should be equally divided between them, but the loss, if any, was to be *borne exclusively by A.* — and B. afterwards effected a sale and received the money; — this agreement was held not to render them such partners in the transaction, as to prevent A. from suing out a commission against B., on the balance due from him to A. (2)

Amount and nature of debt.

A creditor who receives part of his demand *after notice of an act of bankruptcy*, which reduces his debt *below 100l.*, is not thereby precluded from suing out a commission on the whole debt; for such payment after notice of the act of bankruptcy is invalid in law; — and the creditor, moreover, by taking out the commission on the ground that the *whole* demand is unpaid, admits, of course, the *invalidity* of the payment. (3) And upon the same principle, where a creditor, who was ignorant that an act of bankruptcy had been *previously* committed by his debtor, executed a composition deed (which, being after the act of bankruptcy, was therefore invalid) for the amount of his debt, — though he afterwards received a dividend under it — yet as the whole transaction was invalid, it was held that he might nevertheless become a good petitioning creditor in respect of the original debt. (4) So where a creditor by simple contract took a bond for his debt *after the act of bankruptcy*, it was held not to extinguish the original debt, so as to prevent the creditor from suing out a commission upon it. (5) So also, where a creditor took a bill of exchange for part of his debt, drawn by the debtor upon an acceptor, who had not at that time, nor previous to the bill becoming due, *any effects* of the drawer in his hands, — this was held not to prevent the creditor from suing

Creditor, after act of bankruptcy, receiving part of his debt;

or executing a composition deed;

or taking a bond;

or bill on acceptor who had no effects;

(1) *Windham v. Paterson*, 1 Star. 144.

(4) *Doe v. Anderson*, 5 M. & S. 161.

(2) *Marston v. Barber*, 1 Gow. 17.

(5) *Ambrose v. Clendon*, 2 Str. 1042. Cas. temp. Hard. 267. In

(3) *Mann v. Shepherd*, 6 T. R. 79. *Ex parte Miller*, Buck. 285.

re *Bryant*, 1 Rose, 285.

Amount  
and nature,  
of debt.

Executor  
of a bank-  
rupt.

Factor.

Creditor  
residing in  
an enemy's  
country;

trading  
under a  
licence;

where the  
residence  
involun-  
tary.

Debt from  
a person  
discharged  
under the  
insolvent  
act.

his assignees make no claim to the debt upon which he sues out a commission. (1) But an *executor of a bankrupt* cannot sue out a commission upon a debt due to his testator before his bankruptcy. (2)

A *factor* who sells goods in his own name, though without a *del credere* commission, is a good petitioning creditor against the purchaser; and it makes no difference if he communicates the name of the purchaser to his principal; unless indeed the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser. (3)

A commission cannot be supported upon a debt due to a natural born subject, voluntarily residing and carrying on trade in an *enemy's country*; and where some only of the partners of a firm were in that predicament, the debt due to the partnership was held incapable of supporting a commission. (4) But where one of two partners had a *licence* granted by an order in council, to export and import certain goods to and from an enemy's country, and was there only for the fair purposes of the licence when the commission issued — such a temporary residence was deemed not to invalidate the debt. (5) So a mere *involuntary residence* of one partner in an hostile country, without any proof of adhering to the enemy, will not prevent his right to be a petitioning creditor with the other partner. (6)

A creditor of an *insolvent trader*, notwithstanding the discharge of the latter under the insolvent act, it has been held, may take out a commission of bankrupt against him; and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt *at law* to support the commission; though the Lord Chancellor may, perhaps, upon a representation of the circumstances attending the issuing of such a commission, be induced to supersede it. (7)

(1) *Ex parte Cartwright*, 2 Rose, 230.

(2) *Ex parte Goodwin*, 1 Atk. 100.

(3) *Sadler v. Leigh*, 4 Cowp. 195.

(4) *M'Connell v. Hector*, 2 Bos. & P. 113.

(5) *Ex parte Baglehole*, 1 Rose, 271.

(6) *Roberts v. Hardy*, 3 M. & S. 533.

(7) *Jellis v. Mountford*, 4 B. &

A. 256. This case was determined upon the construction of the 53 G. 3.

Though a *public company* have power by a private act of parliament to commence "all actions and suits" in the name of their secretary, as the nominal plaintiff, — this does not enable the *secretary* to petition for a commission of bankruptcy against the debtor to the company. (1)

A *penalty due to the crown* (2) is a sufficient debt to support a commission, as well as an assessment for *church and highway rates* (3); and the assessor in the last case is a good petitioning creditor.

It has been questioned, but not determined, whether a commission would be valid, that was sued out upon the petition of three or more creditors, whose debts did not altogether amount to 200*l.*, though the debt of one was more than 100*l.* (4) But it seems that such a commission would be bad; for though *that one creditor* might *alone* have sued out a commission upon his own debt, yet if he chooses to take one out in conjunction with other persons, pursuant to the terms of the statute, — there does not appear any reason, why the regulations of the statute should be dispensed with in such a case, which require the *aggregate* of the debts to amount to 200*l.*

If after adjudication the petitioning creditor's debt be found *insufficient* to support a commission, it is provided now by the 18th section of the new statute, that in that case the Lord Chancellor, upon the petition of any other creditor or creditors who have proved a debt or debts sufficient to support a commission, (provided the same were not incurred *anterior* to the debt of the petitioning

*Amount and nature of debt.*

Debt due to a public company.

Penalty due to the crown; — church, or highway rates.

Where the *gross* amount of several debts below 200*l.*

Though debt insufficient, Lord Chancellor may still order commission to be

c. 102. since which there have been innumerable other insolvent acts, the last of which is the 7 G. 4. c. 57. but in none of them does there appear to be any provision that clashes with this decision, except only so far as relates to the *particular act of bankruptcy* specified in the last-mentioned statute; viz. the *filing a petition to take the benefit of that act*, which, it is declared, shall not be deemed an act of bankruptcy, unless the person be

declared bankrupt before the time advertised in the Gazette for the hearing of the petition, or within two calendar months from the time of filing it; and see ante, page 84.

(1) *Guthrie v. Fiske*, 3 B. & C. 178. 3 Star. 151.

(2) *Cobb v. Symonds*, 5 B. & A. 516.

(3) *Lloyd v. Heathcote*, 2 B. & B. 388.

(4) *Smith v. Miles*, 1 T. R. 481.

proceeded in. creditor,) (1) may order the commission to be proceeded in, which will then of course have the effect of rendering the commission valid.

## SECTION II.

### *Of the time of contracting and accruing of the Debt.*

Must be contracted whilst party is in trade,

THE debt must either be contracted —or at all events be subsisting, —*whilst the party is in trade* (2); therefore though a creditor whose debt was contracted *before* (3) the party entered into trade, may sue out a commission on his debt; yet a creditor for a debt contracted *after leaving off trade* cannot (4) do so, — though at the same time this is no objection to such a creditor *proving* his debt, in order to receive (5) a dividend. And if a simple contract debt is contracted *whilst the party is in trade*, though he gives the creditor a bond for it *after leaving off trade*, — this will not be such an extinguishment of the debt, as to prevent the creditor from suing out a commission on it (6); for though the bond would be a bar to an action, yet it will not prevent the creditor *under a commission* from proving the consideration. But if a trader indebted in 100*l.* quit his trade, and afterwards become indebted to the same creditor in 100*l.* more, and then pays 100*l.*, without saying on what account, — the creditor in this case cannot take out a commission upon the old debt; for without special directions as to the application of the payment, it will be presumed to be applied in payment of the former debt. (7)

and before some act of bankruptcy.

The debt must also be contracted by, or payable from, the bankrupt *previous to an act of bankruptcy*; and it is

(1) For the relation to the act of bankruptcy cannot be carried back, beyond the accruing of the petitioning creditor's debt; and see post, "Relation."

(2) *Doe v. Lawrence*, 2 Carring. & P. 134.

(3) *Butcher v. Easto*, 1 Doug. 295.

(4) *Meggott v. Mills*, 1 Ld. Raym. 287. 12 Mod. 159. Comb. 463. *Dawe v. Holdsworth*, Peake, 64. *Penrix v. Daintry*, 1 Sid. 411.

(5) 1 Ld. Raym. 287.

(6) Peake, 64.

(7) *Meggott v. Mills*, *Dawe v. Holdsworth*, *supra*.

not sufficient that it accrued previously to the issuing of the commission. (1) But it is now provided by Section 19. of the new statute, that no commission shall be deemed invalid by reason of any act of bankruptcy *prior* to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy *subsequent* to such debt. This enactment is consistent with that of the 46 Geo. 3. c. 135., which was passed to remedy a great inconvenience in the bankrupt law; for before that statute, if *any* act of bankruptcy whatever was shewn to have been committed by the bankrupt before the petitioning creditor's debt accrued, it abrogated the commission, and all the subsequent proceedings on it, — notwithstanding there was in reality an act of bankruptcy *after* the petitioning creditor's debt. (2) So that the petitioning creditor always encountered the risk of having the commission superseded, and the assignees the danger of failing in actions for the recovery of the bankrupt's property, by the other party setting up any prior secret act of bankruptcy. (3) This last-mentioned statute was, however, confined to cases where the petitioning creditor had *no notice* (4) of the prior act of bankruptcy; but the new statute includes all acts of bankruptcy (without any restriction) before the petitioning creditor's debt. Therefore, as the law now stands, — whether the petitioning creditor has notice, or not, of any previous act of bankruptcy before the contracting of his debt, it will not invalidate the com-

*Time of  
contract-  
ing debt.*

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(1) *Moss v. Smith*, 2 Camp. 489. *Clarke v. Askew*, 1 Star. 458. In one old case (*De Golls v. Ward*, Forrest, 243. 4 Brown Parl. Ca. 327.) it was decided to be sufficient, if the petitioning creditor was a creditor at the time the commission issued; but this Lord Hardwicke considered was altered by the 5 G. 2. c. 30.; and see 1 C. B. L. 23.

(2) It was not, however, competent to the *bankrupt himself* to set up a former act of bankruptcy, in order to invalidate the com-

mission. And proof of a prior act of bankruptcy would not of *itself* invalidate the commission, — without proving also a prior debt sufficient to sustain a commission. *Rex v. Bullock*, 1 Taunt. 71.

(3) *Toms v. Mytton*, 2 Str. 744.

(4) But the petitioning creditor was not *presumed* to have had notice of an act of bankruptcy prior to his debt, although it might appear from the depositions to have been actually committed before it. *Thackrah v. Wood*, 3 Star. 141.

**Time of accruing of debt.** : mission, if there is a sufficient act of bankruptcy after the accruing of the debt.

**Verdict in tort, before judgment, insufficient.**

**Debt contracted after arrest, when bad.**

**Accepting a higher security immaterial.**

**Note made before, though indorsed after bankruptcy, good.**

But the debt must be a *complete* and perfect debt before the act of bankruptcy. When, therefore, the debt was founded upon a *verdict* for damages for a *tort* obtained before, but upon which *judgment was not entered up till after* the act of bankruptcy, this was determined to be not a sufficient debt to support a commission; for the debt in law does not accrue, until the judgment is regularly entered on the roll. (1) So, where the act of bankruptcy on which the commission is founded, is a *lying in prison*, and the debt was contracted after the arrest, it was holden insufficient. (2) But the acceptance of a security of a higher nature (3), or the obtaining judgment (4) after an act of bankruptcy will not, as we have seen, prevent the creditor from suing out a commission on a *bonâ fide* pre-existing debt.

A bill of exchange, or a promissory note, is a debt from the *date* of it; therefore an indorsee of a note made and negotiated by the bankrupt before, but indorsed by the payee to the creditor after an act of bankruptcy, is a good petitioning creditor; for he is considered to stand in the place of the indorser, — and the debt, as to the bankrupt, is not created by the indorsement, but by the making of the note. The drawer or maker of a bill or note contracts in fact a debt, the moment the bill or note is given by him, — and any subsequent indorsement relates to the original debt (5); but it seems that the petitioning creditor must shew, that it was indorsed to him before he *sued out the commission* (6), though the debt need not exist in him, (if it

(1) *Ex parte Charles*, 14 East, 197. 16 Ves. 256. *Buss v. Gilbert*, 2 M. & S. 70.

(2) *Ex parte Daggett*, Whitm. B. L. 42.

(3) *Ambrose v. Clenden, &c.* ante, 99.

(4) *Bryant v. Withers*, 2 M. & S. 123. 2 Rose, 12.

(5) *Ex parte Thomas*, 1 Atk. 73. 2 Wils. 135. *Macarty v. Barrow*, 2 Str. 949. *Bingley v. Maddison*, 1 C. B. L. 20. *Glaister v. Hewer*, 7 T. R. 496. *Brett v. Brett*, 13 East, 213.

(6) *Rose v. Rowcroft*, 4 Camp. 245.



was contracted by the bankrupt) before the act of bankruptcy. And where the commission had been sued out upon a bill of exchange for 100*l.*, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards — and the debt was objected to, on the ground that, at the time of the act of bankruptcy, 100*l.* was not due, but only that sum *minus* the discount — the Court thought it sufficient, upon the above principle, viz. that the drawer contracts a debt the moment the bill is given. (1) So, where the bankrupt was the drawer of the bill, and committed an act of bankruptcy before either the bill was due, or had been presented for acceptance, it was held that the bill was a sufficient petitioning creditor's debt, — although it appeared, that subsequent to the commission, the bill had actually been paid by the acceptor. (2)

*Time of accruing.*

Bill not due, a good debt, without deducting discount;

good against drawer, though afterwards paid by the acceptor.

In these cases it will be observed, that the bills had not arrived at maturity, before the act of bankruptcy committed by the drawer; but when the bill has already become *due*, it is then necessary, in a commission against the *drawer*, to prove presentation and notice of dishonour. (3)

When bill *due*, what to be proved against drawer.

If two persons *exchange acceptances*, and before the bills are mature, one of them commits an act of bankruptcy, there is not such a debt due from him as will sustain a commission; for it would be inconsistent, that a man who is not entitled to receive a shilling out of the bankrupt's estate, unless he pays his counter-bill, should be able to stop the bankrupt's trade by taking out a commission. (4) And the acceptor of an *accommodation bill*, who, after the act of bankruptcy of the drawer, pays the amount of it to a person to whom it had been negotiated, has not a good petitioning creditor's debt; — for, before such payment, he was a mere surety for the bankrupt, and did not become a

Exchange of acceptances.

Acceptor of an accommodation bill.

(1) *Brett v. Levett*, 13 East, 213.

(2) *Ex parte Douthat*, 4 B. & A. 67.

(3) *Cooper v. Machin*, 1 Bing. 486.

(4) *Sarrat v. Austin*, 4 Taunt. 200. *Bleasby v. Crossley*, 2 Car. & P. 213.

Time of  
accruing.

When  
debt barred by  
statute  
of limitations.

creditor before he *actually paid* the bill, which was after the act of bankruptcy. (1)

It has been holden, by several of the earlier cases, that a debt, though barred by the *statute of limitations*, would support a commission — on the ground that the statute did not extinguish the debt, but the remedy — and that the statute moreover extended only to the particular remedies *by action* therein mentioned. In one of the cases, indeed, it was admitted, that the *bankrupt himself* might apply in such a case to supersede the commission; but that if *he* submitted to it, a debtor of the bankrupt, or any third person, could not avail himself of it as a defence to invalidate the commission, and thus elude the payment of a just debt to the assignees. (2) In one of the later cases, however — where the bankrupt had died before surrender, and, consequently, had never the power to avail himself of the objection — Lord Eldon decided, that a *creditor* might do so, by applying to take out another commission upon another debt. And in a luminous judgment delivered upon this occasion, his Lordship, (after observing upon all the antecedent cases on the subject,) questioned the law laid down by Lord Mansfield in *Fowler v. Brown*; and added, that he saw no reason why it was not competent to the bankrupt in the first instance to take the objection, and if he waived it, then for the creditors to avail themselves of it. (3) And in a subsequent case, where the same question occurred, his Lordship intimated, that he had many additional reasons confirmatory of his former decision. (4) It was, indeed, held in one case, that as long as any remedy was open by which the debt could be recovered, the objection could not be taken, either by the bankrupt, or the creditors. As, where in an action brought in the Common Pleas by a bankrupt to try the validity of a commission, the de-

(1) *Ex parte Holding*, 1 G. & J. 97.

(2) *Swayne v. Wallinger*, 2 Str. 746. *Quantock v. England*, 2 Bl. 703. 5 Burr. 2628. *Fowler v. Brown*, 1 C. B. L. 13.

(3) *Ex parte Dewdney*. *Ex parte Seaman*, 15 Ves. 494.

(4) *Ex parte Roffey*, 2 Rose, 245.

debtor produced an office copy of a roll in the Court of King's Bench, by which it appeared, that an action had been commenced there against the bankrupt and his partner more than six years before, and that continuances of mesne process had been regularly entered, and brought down to the term before the trial in the Common Pleas—the latter Court decided, that the debt in this case was not barred by the statute, as it might have been recovered against the bankrupt in the Court of King's Bench. (1) But though this decision was come to by the Court of Common Pleas after two arguments, it has been lately reversed upon a writ of error in the Court of King's Bench. (2)

Time of  
accruing.

An *Executor* may sue out a commission on a debt due to his testator, even *before probate* of the will, provided he obtains the probate before the commissioners make their adjudication. (3) And where the probate had an insufficient stamp upon it in the first instance, it seems, that upon a valid stamp being afterwards affixed to it, though after adjudication, the probate would then be good by retrospect, and would support the executor's debt as petitioning creditor. (4)

Executor  
before  
probate.

Probate  
having an  
insufficient  
stamp.

To sustain a commission upon a debt due to the *Wife dum sola*, she must in general be petitioning creditor jointly with her husband. (5) But a bill of exchange payable to the wife before marriage, being an instrument transferable at law, and the right of action shifting with the possession of it, is to be considered, not as a *chase in action*, but rather as a chattel personal vested in the husband by the act of marriage (6); and it has been accordingly determined, that the *husband alone* may sue out a commission upon a promissory note given to the wife *dum sola*. (7)

Debt due  
to wife  
*dum sola*.

(1) *Gregory v. Hurrill*, 3 B. & R. 512. 6 Moore, 525. 2d argumt. 1 Eng. 324. 8 Moore, 189.

(2) *Eder's B. L.* 2d ed. 46.

(3) *Ex parte Paddy*, Buck. 236. 3 Moll. 241.

(4) *Rogers v. James*, 2 Marsh. 425. 7 Taunt. 147.

(5) *Runsey v. George*, 1 M. & S. 176. *Ex parte Staples*, 7 Vin. Abr. 67. *Master v. Winter*, Dav. 464.

(6) *M'Neillage v. Holloway*, 1 B. & A. 218.

(7) *Ex parte Barber*, 1 G. & J. 11.

**Duties and liabilities.****Infant.**

When either of the parties is an *Infant* at the time of contracting the debt, whether debtor (1) or creditor (2), the debt will not support a commission. But where a bill of exchange was drawn upon a trader when an infant, but accepted by him after he was of age, this was holden to be a sufficient debt. (3)

All contracts *in trade* made by *clergymen* whilst in *holy orders* being, as we have already seen (4), absolutely null and void, — it follows, of course, that any debt arising from such a contract would not support a commission.

## SECTION III.

*General Duties and Liabilities of the Petitioning Creditor.*

After execution against the body, cannot sue out a commission.

Except when.

But court of law no power to

Where a creditor upon a judgment has sued out an execution against the *person* of his debtor, he is estopped from afterwards petitioning for a Commission of Bankrupt against him (5); for taking the body in execution is considered in law a satisfaction for the debt (6); and he cannot after thus making his election, change the nature of his execution, and pursue his debtor's property. (7) But where a defendant was in execution for a debt due to two partners; and afterwards one of the partners sued out a commission against him, for a separate debt due to himself—this was held, not to be affected by the previous proceeding for the joint debt. (8) And a proceeding under a judgment, *not against the person*, is not any objection to issuing a commission upon the unsatisfied debt. (9) Notwithstanding, also, a plaintiff sues out a commission against

(1) *Ex parte Barwis*, 6 Ves. 601.  
*Ex parte Sydebotham*, 1 Atk. 146.

(2) *Ex parte Barrow*, 3 Ves. 554.  
*Ex parte Moreton*, Buck. 42.

(3) *Stevens v. Jackson*, 4 Camp. 164.

(4) Ante, p. 20. 57 G. 3. c. 99. s. 3.

(5) *Barnsby's case*, 1 Str. 653.  
*Cohen v. Cunningham*, 8 T. R. 123.

(6) *Forster v. Jackson*, Hob. 59.  
*Vigers v. Aldrich*, 4 Burr. 2482.

*Jacques v. Withers*, 1 T. R. 557.  
*Tanner v. Hague*, 7 T. R. 420.  
*Clarke v. Clement*, 6 T. R. 525.

(7) This observation is, of course, to be taken subject to the provisions on this head contained in the different insolvent acts.

(8) *Ex parte Stevens*, 1 C. B. L. 25.

(9) *Miles v. Rawlins*, 4 Esp. 194.

his debtor, after previously taking him in execution — yet a *Court of law* has no power to discharge the defendant out of custody; this being a matter for the peculiar consideration of the Lord Chancellor. (1)

*Duties and liabilities.*

discharge a defendant.

Petitioning creditor has no election.

The petitioning creditor has not the *election*, which the *other creditors* of the bankrupt possess — either to come in as a creditor under the commission, or to sue the bankrupt at law; for if *he* were permitted to proceed at law, the commission must be superseded, which would materially affect those creditors who had proved under it — as it would render their proofs perfectly nugatory. His election is, therefore, determined by taking out the commission; and this, not only as to the debt upon which the commission is founded, but also as to every other claim which he may have against the bankrupt; an incapacity which does not attach to the general creditor; for if the latter has demands against the bankrupt of a distinct nature, he may prove one debt under the commission, and proceed at law for the recovery of the other. (2) And though the commission has not been opened, the petitioning creditor will equally be prevented from proceeding at law against the bankrupt; for as long as the commission is capable of prosecution, this disability is held to attach. (3)

A petitioning creditor, however, who took out a separate commission against one of three partners for a joint debt, (which was afterwards superseded, and a joint commission taken out by another creditor) is not deprived of his election, under the *second* commission, to prove either against the *joint*, or *separate*, estate. (4) But a joint creditor, who sues out a joint commission against partners, or a commission against a trader as a *surviving partner*, can only prove, under that commission, against the joint estate. (5):

Except when.

(1) *McMaster v. Kell*, 1 Bos. & P. 302.

(4) *Ex parte Smith*, 1 G. & J. 256.

(3) See post, "Election."

(5) *Ex parte Barned*, 1 G. & J. 309.

(2) *Ex parte Prowse*, 1 G. & J. 32.

**Duties and  
liabilities.**

Irregu-  
larity in  
suing out  
commis-  
sion.

**Liability  
for costs  
of com-  
mission;**

for neces-  
sary ex-  
penses.

When al-  
lowed  
costs on  
petition.

**Penalties  
for com-  
pounding,**

The petitioning creditor incurs many liabilities, if he commits irregularity in suing out the commission; for the commission will not only in some cases be superseded at his costs — but the bankrupt has also his remedy against him, either by bringing an action on the case for damages, or by procuring an assignment of the bond to the Chancellor (1)

The petitioning creditor is also personally answerable to the messenger for his costs, as taxed by the commissioners, up to the choice of assignees (2); as well, indeed, as for all the costs of working the commission up to that period; though, if the commission is proceeded in, the assignees are then bound to reimburse him the amount (3), that is, provided the funds of the bankrupt's estate are sufficient for the purpose — and if insufficient, he must make up the deficiency out of his own pocket (4). But this liability is only for the necessary expenses of working the commission; he is not, therefore, liable for the costs of an unnecessary and fruitless journey undertaken by the messenger to a distant place, without any authority from himself (5). And if a groundless application is made to supersede the commission, the petitioning creditor will in that case be allowed the costs of resisting the application out of the estate. (6)

The commission is not issued for the benefit of the petitioning creditor alone, but is in the nature of an execution for the benefit of all the creditors. Therefore it is provided by the 8th section of the new statute, that if the petitioning creditor *after striking a docket*, receive from the bankrupt any money, or security, either for the whole, or for any portion of his debt, whereby he may receive more in the pound than the other creditors, the commission is not only supersedable, but the petitioning cre-

(1) See post.

(2) *Ex parte Johnson*, 1 G. & J. 23. *Burnwood v. Kant*, 2 Carr. & P. 135.

(3) *Hartop v. Jakes*, 3 M. & S. 438. *Hart v. White*, 1 Holt, 376. *Finchett v. How*, 2 Camp. 278.

(4) *Ex parte Reeser*, 4 Meriv. 190.

(5) *Billings v. Waters*, 1 Str. 363.

(6) *Ex parte Bottomley*, 5 Mad. 91.

ditor is also liable to forfeit his whole debt, as well as to repay or deliver up the money, or security, to such persons as the commissioners shall appoint, for the benefit of the creditors. (1) And he equally incurs the forfeiture of his debt, though some of the bankrupt's creditors are privy to the transaction. (2) Where a petitioning creditor after the act of bankruptcy, but *before the striking the docket*, received from the bankrupt a sum of money which reduced his debt below 100*l.* — though Lord Eldon in such a case refused to supersede the commission, as the payment could not be retained against the assignees — yet, as the petitioning creditor had not avowed that he held the payment for the assignees, he was ordered to pay the costs of the petition and inquiry. (3) Any bargain, also, made by the petitioning creditor with the solicitor upon striking the docket — as to proving the act of bankruptcy, or being indemnified against the expenses of issuing the commission — will be considered a contempt of the Great Seal; and any application by the petitioning creditor to carry such a bargain into effect will, of course, be dismissed. (4) But though the petitioning creditor, *after* striking a docket, is prohibited from receiving from the bankrupt any money, or security, whereby he may receive *more* in the pound than the other creditors, — yet it has been determined, that a contract to sue out a commission, in consideration that a friend of the bankrupt would give the petitioning creditor *for shillings in the pound* on his debt, was not illegal, — and that a bill given for the agreed sum was valid. (5)

*Duties and liabilities.*

or receiving part of his debt from the bankrupt.

Corrupt bargain with solicitor a contempt.

The petitioning creditor is bound to be assistant to the commission in all its stages, which (as it originates from himself) he is pledged to the validity of. Thus, where the petitioning creditor agreed with the bankrupt, that he would not oppose his petition for a *supersedeas*, in consideration of the bankrupt giving him a warrant of

Bound to be assistant to the commission;

(1) And see *Ex parte Thomson*, 1 Ves. 157. *Ex parte Stokes*, 7 Ves.

(3) *Ex parte Miller*, Buck. 283.

(4) *Ex parte Wilson*, Buck. 306.

(5) *Fry v. Malcolm*, 5 Taunt. 117.

(2) *Ex parte Brine*, Buck. 108.

**Duties and liabilities.**

to make previous inquiries as to trading, &c.; to give information to the assignees; to produce documents.

Whether bound to give evidence against his own commission.

attorney for the amount of his debt — the Court of Common Pleas set aside the judgment entered upon it, Sir J. Mansfield saying, that it was the duty of the petitioning creditor to support the commission. (1) He ought, also, to make due inquiry as to all the circumstances affecting the bankruptcy, before he issues a commission (2); and to give information to the assignees, upon every subject that comes within his knowledge as petitioning creditor. He is bound, therefore, to produce upon a trial, a bill of exchange, upon the direct proof of which his own debt, as petitioning creditor, can be established. (3). And where shortly before the commission he had taken out execution against the bankrupt for part of the debt on which the commission issued, he was ordered to furnish the assignees with all the particulars of his debt — though this was in aid of an action brought by them against the sheriff for the very purpose of impeaching the execution, on the ground of a previous act of bankruptcy (4). And where a petitioning creditor, after the choice of assignees, stated to their solicitor, that the commission was not a good one, because the consideration of the bill on which it was sued out was for a gambling debt, and the assignees were thereby put to expense in establishing the validity of the commission, and also incurred further expenses by his refusal to produce the bill, or to discover what had become of it — Lord Eldon ordered that he should pay all the costs, which he had thereby occasioned to the assignees. (5) It was held by the late Vice-Chancellor, that a petitioning creditor, in a *separate* subsisting commission, was not compellable to attend as a witness before the commissioners, in support of a *subsequent joint* commission — as that would be in effect to destroy his own proceedings (6); but Lord Eldon subsequently decided the contrary. (7)

(1) *Thomas v. Rhodes*, 3 Taunt. 478.

(2) *Ex parte Blackmore*, 6 Ves. 3.

(5) *Ex parte Glossop*, 2 Rose, 586. *Ex parte Jackson*, Ibid. 188. *Ex parte Graves*, 1 G. & J. 86.

(4) *Ex parte Glover*, 2 G. & J. 60.

(5) *Ex parte Glossop*, *supra*.

(6) *Ex parte Stones*, 1 G. & J. 7.

(7) *Ex parte Harrison*, 2 G. & J. 135.



The petitioning creditor is also estopped by the affidavit of debt, which he makes on suing out the commission, from contending afterwards, that the debt was insufficient to support it. Thus, where the bankrupt's assignees sued him for the bankrupt's money which he had got into his hands, and it accidentally came out by a statement of accounts, that the balance due from the bankrupt was less, than what was sufficient to sustain the commission,—the petitioning creditor was not allowed to avail himself of that fact, in order to defeat the action. (1)

When any action is brought for the recovery of property wrongfully seized by the messenger under the commission, the petitioning creditor should be made the defendant; in such action, and not the messenger—if the latter has only acted in obedience to the warrant of the commissioners—for, in such a case, the messenger would be entitled at any rate to a verdict. And if the plaintiff recovers against the petitioning creditor, the latter is liable (2) not only for the taxed costs of the action, but is also bound to repay the plaintiff such costs as he is obliged to pay to the other defendant. It is provided, also (3), in every such action, that proof of the defendant being petitioning creditor is sufficient for the purpose of making him liable, in the same manner, as if the act complained of had been done or committed by him.

As to the competency of the petitioning creditor as a witness, in actions where the validity of the commission comes in question, the reader is referred to a subsequent chapter, which treats on Evidence in actions by or against the assignees. (4)

(1) *Harmer v. Davis*, 7 Taunt. 577. *Moore*, 300. See vide *Green v. Jones*, 2 Camp. 412. *Dowden v. Fowler*, 4 Camp. 38. *Lloyd v. Stretton*, 1 Star. 40; and see post, "Evidence."  
 (2) Section 31.  
 (3) Section 32.  
 (4) See post, Ch. XVII.

## CHAP. V.

## OF THE COMMISSION.

1. *Of issuing the Commission.*
2. *Of the general Effect of the Commission.*
3. *Of a Second Commission.*
4. *Of a Joint Commission.*
5. *Of renewed and auxiliary Commissions.*
6. *Remedy where Commission maliciously sued out.*

For the *Costs of issuing the Commission*, see post,  
Chapter on Costs.

## SECTION I.

*Of issuing the Commission.*

By sections 12 and 13 of the new act, any one or more of a trader's creditors to the amount required by the statute (1), may petition the Lord Chancellor to issue a commission against him, previously making an affidavit of debt, and giving bond to the Lord Chancellor, for duly proving the debt, and the act of bankruptcy.

Striking a  
docket;  
practical  
directions.

If the petitioning creditor reside in *London* or the vicinity, he must make an affidavit of his debt (2) before a Master in Chancery, in which he swears that he believes his debtor is become a bankrupt, (an allegation, however,

(1) Ante, page 88.

(2) See form, Vol. II. Before this proceeding, however, search should be made at the bankrupt office, in order to ascertain if any docket has been already struck; for which purpose the docket-book

may be had free access to, from ten in the morning till three in the afternoon, and from six to eight in the evening. See General Orders, 29th Dec. 1856, and 15th April 1856, and ex parte Smith, 19 Ves. 473.

which is not required by this or any former statute, but is merely a practice adopted by the authority of the Great Seal)(1); and the bond to the Chancellor must be executed at the Bankrupt office. If the creditor resides in the *country*, the affidavit is then made before a Master Extraordinary in Chancery, and the bond executed at the same time, and then both are sent to an agent in London to do what is needful. When the affidavit and the bond are in either case delivered at the Bankrupt office, an entry must be made in the docket-book (2), and the petitioning creditor is then said to have *struck a docket*. After this, the solicitor must, within the next four days, bespeak the commission—upon which he pays the fees for it, and the clerks make out then a petition to the Chancellor, and procure also a commission from the office of the patentee. These are tacked together, and at one corner of the petition the *fiat* is written: “Let a commission issue, as prayed, &c.” The petition and commission are then taken to the Chancellor, who signs the *fiat*; after which the commission is immediately sealed with the Great Seal,—and this is done either in private, or at a public Seal. The commission always bears date the day it is sealed; and that date is then entered under the column left for it in the docket-book.

Striking  
a docket:

Where two parties apply at the same time to strike a docket, and both are prepared to issue a commission, they must draw lots at the Bankrupt office for the preference.(3) And where instructions for a docket were received from the *country* on a Sunday by a solicitor, who before the office opened on the following morning received similar instructions from another client, it was decided that the same rule of practice should be followed. (4) If, however, only *one* party is prepared to issue the commission, then the commission is directed to be issued to the person who

When two parties apply together, must draw lots;

but if only one prepared, he is entitled

(1) 14 Ves. 28. 297.  
(2) See General Orders, 29th Dec. 1806, and 14th April 1815, 2 vol.

(3) General Order, 29th Dec. 1806.  
(4) *Hayer's case*, 13 Ves. 197.

*Striking a docket.*

to the commission.

is so prepared (1); for the drawing of lots only applies to those cases, where *both* parties are equally prepared to issue a commission forthwith. When one party, therefore, was not prepared to certify respecting the intended commissioners in a country commission, as required by the general order (2), the other party was held entitled to the commission. (3)

When commission superseded, any creditor may strike a fresh docket.

Where a commission is ordered to be superseded, though on the petition of the assignees, any other creditor may strike a fresh docket against the bankrupt after the order is pronounced, and even before it is drawn up or signed by the Lord Chancellor;—and the claim of the *assignees* to issue a fresh commission, is not greater than that of any other creditor; the rule being, that whoever strikes the *first* docket will be preferred. (4)

When variance in the name.

If there is any variation in the spelling of the name of the bankrupt, even of one letter, it is the practice at the Bankrupt office to permit a second docket to be struck by any other creditor, it being taken for granted, that the name is that of a different person (5); and the party having the *first regular docket* in the office, has been considered as entitled to the priority. (6) But where the solicitor, who struck the second docket in a case of this kind, *must have known* it was the same person,—the Lord Chancellor ordered the second commission to be superseded at the costs of the solicitor. (7) If there is any error in the affidavit, or bond, upon which a commission has issued, it has been determined that they cannot be re-sworn or re-executed—having been already used for all the purposes for which they were made;—but that there must be an entire new docket. (8)

Affidavit, &c. cannot be re-sworn.

(1) General Order, 29th Dec. 1806.

(2) 25th July 1817.

(3) *Ex parte Hardman*, 1 Jac. & W. 293.

(4) *Ex parte Bower*, 1 G. & J. 262.

(5) 6 Ves. 434. 1 Rose, 314. 1 G. & J. 22.

(6) *Ex parte Stocker*, 1 G. & J. 249.

(7) *Ex parte Ward*, 1 Rose, 314.

(8) *In re Rutledge*, 2 Rose, 369. See en. Whether this would be now held necessary, as there is no stamp duty imposed any longer upon either the affidavit, or the bond.

A docket ought not to be struck, merely as a measure of precaution, to prevent another creditor from taking out a commission. (1) And where it is used as the means of bartering for some arrangement, it will, as we have already seen, be considered a contempt of the Great Seal. (2)

*Striking a docket.*

Docket used for an improper purpose, a contempt.

When a month has passed from the striking of the docket, without any thing further being done, the practice was in such a case, not to let a commission issue, without an affidavit that the petitioning creditor's debt had not been paid. (3) But by a subsequent general order of Lord Eldon (4), it is declared, that when a docket has been struck more than one calendar month without a commission having been bespoke, the docket shall be considered as expired, and of no effect for the purpose of issuing a commission.

The affidavit made by the petitioning creditor is general, and need not state the particulars by which the bankrupt became indebted (5); and if it state that the debt is for goods sold and delivered, though the petitioning creditor had at the time entered up judgment in an action for the debt, this has been held sufficient (6); nor will it be any objection to the commission, that the petitioning creditor had not relinquished his judgment. The provision in the statute is directory only, and not conditional;—therefore, where it appeared upon the face of the affidavits of four petitioning creditors, that their debts did not amount to 200*l.*, though their debts proved before the commissioners amounted to more than that sum—it was held that this irregularity did not make the commission void at law, though it might afford a ground of application to the Lord

*Affidavit.*

Irregularity not a good ground at law for invalidating the commission.

(1) 16 Ves. 145.

(2) 18 Ves. 298.; and see ante, 104.

(3) *Ex parte Buckley*, Buck. 367.

(4) 28th May 1819. This order, which was made shortly after *ex parte Buckley*, recites the previous practice at the bankrupt office, as being consistent with the directions

contained in the order; but this recital does not agree exactly with what is stated by the Lord Chancellor in that case.

(5) *Ex parte Wood*, 1 Atk. 153. *Bryant v. Withers*, 1 V. & B. 211.

(6) In re *Bryant*, 1 Rose, 283. *Bryant v. Withers*, 2 M. & S. 124. 2 Rose, 8.

**Affidavit.**

Not evidence of the debt in any subsequent proceeding.

As to stating belief of an act of bankruptcy.

Chancellor to supersede it — or to stay proceedings till the proper affidavits were made. (1) The affidavit, indeed, is of no use in any period subsequent to the commission; for it is not even *prima facie* evidence of the debt, either before the commissioners, or in any action where the debt is disputed — which must be proved by other evidence. (2)

A docket should not be struck without some solid ground of belief, that the trader has committed an act of bankruptcy (3); and the affidavit, as to this matter, is too often made with a precipitancy which has called for the censure of the Court. (4) But if proof can be made of an act of bankruptcy before the issuing of the commission, though it was in fact committed after the swearing of the affidavit, and the striking of the docket — the commission will not on that account be rendered invalid. (5) Thus, where the act of bankruptcy was by *lying in prison*, and the docket was struck before the requisite period of imprisonment had expired, the commission was nevertheless supported, which was issued after the expiration of such period. (6)

Petition must agree with the affidavit.

The petition must agree with the statement of the debt in the affidavit. Thus, where the secretary to a public company struck a docket for a debt *due to the company*, but the petition stated the debt to be *due to him in his own right* — it was held, that the commission could not be supported upon a debt due to the company. (7)

**Bond.**

The bond, which the petitioning creditor is required to give to the Lord Chancellor, is in the penalty of 200*l.*, conditioned for proving his debt as well before the commissioners, as at any trial at law, in case the commission be contested — and also for proving the party to have com-

(1) *Hill v. Heale*, 2 N. R. 196.

(2) *Ibid.*

(3) *Ex parte Bourne*, 16 Ves. 145.

(4) 6 Ves. 431. 14 Ves. 85. 1 V. & B. 55.

(5) *Hopper v. Richmond*, 1 Star. 507.

(6) *Ex parte Dufrene*, 1 V. & B. 51. 1 Rose, 333. *Ex parte Parson*, 15 Ves. 462. *Wydown's case*, 14 Ves. 80.

(7) *Guthrie v. Fiske*, 2 Star. 151

mitted an act of bankruptcy, and for proceeding in such commission. The bond, however, need not be precisely of the same date as the affidavit; as in the case of striking a docket, where the amount of the debt in the affidavit was incorrectly stated, the Lord Chancellor ordered a supplemental affidavit to be made without any new bond being given. (1)

Bond.

Supplemental affidavit, when permitted.

The bond must be executed by the petitioning creditor; an infant, therefore, who is unable to bind himself by bond, cannot be a petitioning creditor, — nor will any other person be allowed to execute the bond for him. (2) And where the debt to support the commission is made up of several debts — each of the petitioning creditors being required to make an affidavit of his debt, and to enter into the bond — if one of these, therefore, is an infant, the commission cannot be supported. (3) Where husband and wife are petitioning creditors, the bond should be executed by the husband. (4)

As to execution of bond. Infant.

Husband and wife.

Where partners are petitioning creditors, it will be sufficient if one of them makes the affidavit, and executes the bond (5); and the same also with respect to assignees. (6)

Partners.

Assignees.

By an order of Lord Apsley's (7), the mere striking a docket was directed, in no case, to prevent the issuing of a commission by any other creditor, so as such second application was not made, before the expiration of four days after the first docket struck. A practice, however, a good deal at variance with the terms of this order, was long permitted to grow up at the Bankrupt office, and which, Lord Eldon has observed, afforded testimony that the order itself was inconvenient to be followed; and he

Sealing commission.

(1) *Ex parte Moughtin*, 1 G. & J. 355.

(5) *Ex parte Hodgkinson*, 2 Rose, 172. 19 Ves. 291. *Roberts v. Hardie*, 2 Rose, 174. (note). *Ex parte Benjamin*, Buck. 44. *Ex parte Peele*, Buck. 457.; but see ante, 89.

(6) *Ex parte Blakey*, 1 G. & J. 197.

(7) 14th Feb. 1774.

(2) *Ex parte Barrow*, 3 Ves. 541.

(3) *Ex parte Morton*, Buck. 42.

(4) *Banasy v. George*, 1 M. & S. 176.



*Sealing  
commis-  
sion.*

When  
commis-  
sion should  
be sealed.

thought also that if strictly acted upon, it would open a door to great fraud. (1) It has been, therefore, altered and modified by subsequent orders, both of Lord Erskine and Lord Eldon (2), by which it is directed, that if, after striking a docket, the petitioning creditor do not within four days afterwards order a commission to be sealed at the then next public seal—in case there shall be one within seven days after the docket shall be struck—or by a private seal within eight days after striking the docket—and cause the same to be sealed accordingly, then any other person may sue out a commission, without any notice to the person who first applied for one. An application for a commission, on the *evening of the fourth day* from striking the docket, immediately before 8 o'clock (the hour of shutting up the office), is sufficient; and, if necessary, the clerk ought to remain there a quarter of an hour later, to enable the party to proceed next morning to have his commission sealed. (3) When the 4th day is a holyday, the party should nevertheless apply for the commission on that day, at the chambers of the clerk of the Secretary of Bankrupts; for, if he does not, he runs the risk of losing the commission, inasmuch as whoever applies first the next day has a right to it. (4)

Commis-  
should be  
sealed at  
the *next  
immediate*  
public seal.

The meaning of the direction in the orders is, that the commission shall be sealed at the *next immediate* public seal within the seven days, without any discretion on the part of the officers at the Bankrupt office to defer the sealing, till a subsequent public seal within the seven days (5); therefore where there was a seal on the 5th, and another on the 7th day, it was held that the commission must be sealed on the 5th. But notwithstanding the terms of the order, and though the creditor does not bespeak the commission (that is, order it to be sealed,) until the 5th day, yet if he does

(1) *Ex parte Leicester*, 6 Ves. 453.

(2) 29th Dec. 1806. 13th April, 1815.

(3) *Nicholls's case*, 19 Ves. 616.

(4) *Ex parte Cooper*, 12 Ves. 481.; and see 1 Mont. Dig. 77.

(5) *In re Lambert*, 1 Rose, 258.



this before any other creditor applies to strike a docket, the application of the first creditor will be preferred. (1)

**Sealing.**

Where, however, from some misunderstanding, or from the hurry of business at the Bankrupt office, the clerk omitted to get the commission sealed, or make the proper entry in the docket-book, (without which the docket is not considered to be struck. (2),) previously to the application of another solicitor to strike a docket, Lord Eldon thought it would be construing the order too strictly, to deprive the first solicitor of his priority, which had not in fact been endangered through any fault of his. (3)

First docket not prejudiced by a mistake at the bankrupt office.

Upon some occasions, the petitioning creditor has been limited to a shorter time for sealing, than what is specified in the general orders: as where he had done all other previous acts, but purposely delayed sealing the commission, and took that as an objection to a petition by the bankrupt to supersede it, Lord Eldon limited the time for sealing the commission to three days. (4)

When a less time will be limited for sealing.

Where a creditor, who had struck a docket, ordered the commission within the four days, and afterwards countermanded the order, and then again changed his intentions, he was, notwithstanding this, held to be entitled (in the absence of any collusion) to have the commission sealed on the 7th day, in preference to another creditor, who struck a docket between the countermand of the order, and the 7th day. (5)

When first creditor entitled to preference, notwithstanding countermand.

The commission must be sealed *after* the act of bankruptcy; but it is no objection that the act of bankruptcy is

Must be sealed after act of bankruptcy.

(1) In re *Graham*, Buck. 529.

(2) General Order, 26th Dec. 1806. 13th April, 1815.

(3) *Ex parte Evans*, 1 Rose, 162. 2 Rose, 323. *Ex parte Slatford*, Buck. 1. In one of these cases (2 Rose, 324.) Lord Eldon intimated, that it would be an improvement to the above orders, to insert a provision, that both the clerk of the solicitor applying for the docket, and the clerk at the Bank-

rupt office should indorse, as a memorandum upon the documents for the docket, the time of their being delivered at the Bankrupt office. Such a provision, however, does not seem to have been ever made by any general order to that effect.

(4) *Ex parte Williams*, 2 Ves. & B. 255.

(5) Anon. 1 Mont. Dig. 77.

**Sealing.**

Once sealed in the night.

Distinction between awarding and issuing.

Commission a matter of right;

as well as the adjudication.

Proceedings not stayed before opened.

when publication restrained;

committed the *same day*, provided it be committed *before* the actual sealing of the commission. (1) And upon one occasion, where it was of importance to prevent the operation of an extent against the bankrupt's effects, Lord Eldon, in order to effect this object, actually sealed the commission in the middle of the night. (2)

When the commission has passed the Great Seal, it is said to be *awarded*, which is a matter distinct from the *issuing* of it; for it is not strictly *issued*, until it is delivered into the messenger's hands for the purpose of being opened. (3)

With respect to the issuing of the commission, the words of the 12th section of the new statute follow those in the 13 Eliz. c. 7., which have always been construed to be imperative on the Lord Chancellor. The granting of the commission, therefore, if the creditor has pursued the directions of the statute, is not discretionary on the part of the Chancellor, but a matter of right on the part of the creditor. (4) And not only is the granting it a matter *ex debito justitiæ*, but the petitioning creditor has also a right to have the adjudication of the commissioners under it, if the trading, the act of bankruptcy, and his debt can be proved before them. The Lord Chancellor, therefore, will not stay proceedings upon a commission before it is opened, upon a mere allegation that there is no petitioning creditor's debt; for that would virtually be to refuse to issue the commission. (5) Upon some occasions, however, the Chancellor will restrain the publication of the bankruptcy in the Gazette, without otherwise interfering with

(1) *Ex parte Dobree*, 8 Ves. 82. *Wydown's case*, 14 Ves. 87. *Ex parte Dufrene*, 1 V. & B. 54. 1 Rose, 333. *Ex parte Paxton*, 15 Ves. 462.

(2) 14 Ves. 87., in *Castell and Powell's bankruptcy*.

(3) *Ex parte Freeman*, 1 V. & B. 39. *Watkins v. Maund*, 3 Camp. 309.

(4) *Backwell's case*, 1 Vern. 152. 2 Ch. Ca. 191. *Ex parte Wilson*, 1 Atk. 215.

(5) It was formerly the practice to enter *caveats* in the Bankrupt office against the issuing of commissions, which was frequently productive of fraud; as by that means an opportunity was given to persons, against whom the commission was to be taken out, to make away with their effects. But ever since Lord Hardwicke expressed his disapprobation of the practice, the *caveat* fell into disuse. *Ex parte Parsons*, 1 Atk. 72.

the progress of it; as where a person, against whom it issued, stated on oath that he was solvent, and had committed no act of bankruptcy, and offered to pay the amount of the petitioning creditor's debt into court. (1) But where there is a clear case of *fraud*, the Court will then make an order to stay proceedings before adjudication, it being its duty to put an end to fraud without loss of time (2): as where an equitable creditor signed a composition deed with his debtor, and afterwards attempted to sue out a commission in the name of his trustee. (3)

Sealing.

but proceedings stayed in case of fraud;

The commission is directed to five commissioners (4), empowering four or three of them to execute it. These, where the commission is to be executed in *London*, are generally all barristers specially appointed by the Lord Chancellor.

to whom directed.

If the commission is to be executed in the *Country* (which can only be when the bankrupt resides above 40 miles from *London*), two of the commissioners at the least must be barristers — who are *quorum* (5) commissioners — and the remainder may be attornies. Their names are delivered in by the solicitor at the Bankrupt office, when he bespeaks the commission; and those commissioners, who are barristers, must be resident at or near the place where the commission is to be executed (6); no *London commissioner's* name being allowed to be inserted in a *Country* commission, without a certificate, that it is with his express consent (7), — nor without a certificate also that he intends to act. If there are not two barristers resident within 20 miles of the place where the commission is to be executed, or who will be willing to attend there, or at some convenient place in the neighbourhood, for the fees allowed by the statute, the commission may then be directed to five attornies; but in this case the solicitor applying for the commission must make an

Country commission, to whom directed;

when may be directed to attornies.

(1) *Ex parte Fletcher*, 1 Rose, 335.

(2) *Ex parte Battier*, Buck. 426.

(3) *Ibid.*

(4) And see next Chapter.

(5) See Section 23.

(6) Lord Loughborough's Order, 12th August 1800.

(7) Lord Eldon's Order, 3d Feb. 1802.

*Country  
commis-  
sion.*

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*When  
commis-  
sioners  
falsely de-  
scribed.*

*Where to  
be exe-  
cuted.*

*No com-  
missioner  
must be a  
creditor.*

affidavit of the fact. (1) Any evasion of the general orders as to these matters — such as carrying the commission to a distant country town, to get it out of the reach of barristers residing near another town, where it might with as much propriety be executed — will be a ground for superseding the commission, at the costs of the party who took it out. (2) But when no barrister resides so near, as to be willing to attend without his travelling expenses being paid, this is an excuse for dispensing with the orders (3), upon a proper statement of the fact upon affidavit, when the commission is applied for. (4) Where a solicitor, however, by a false description (in adding “esquire” to the names of two solicitors), obtained a commission to be directed to them, it was superseded, and he was charged with costs. (5) A *Country* commission, it seems, should be executed *within ten miles* of the place to which it is issued (6); and the solicitor applying for it is required to certify, that none of the commissioners, whose names he delivers in, is a creditor of the bankrupt; if any *creditor’s* name be inserted as a commissioner, the commission will be superseded. (7)

(1) General Order, 15th August, 1821. *Ex parte Goodman*, 5 Mad. 462.

(2) *Ex parte Harbin*, 1 Rose, 58.

(3) *Ibid.*

(4) *Ex parte Conway*, 13 Ves. 62.

(5) *Ibid.*

(6) 1 Mont. Dig. 637.

(7) *Ex parte Story*, Buck. 70. *Ex parte Mathews*, 1 G. & J. 164. *Ex parte Prosser*, 2 Rose, 570. *Ex parte Crudwell*, 2 Mad. 292. When Lord Eldon was appointed to the seals, it seems that great frauds had been frequently practised in suing out *Country* commissions; and very soon after his taking upon himself the office of Chancellor, he was induced to notice the fraudulent practices which then prevailed. “Commissions,” he says, “as they are frequently conducted in the *country*, are little more than

stock in trade for the commissioners, the assignees, and the solicitor. Instead of solicitors attending to their duty as ministers of the court, commissions of bankruptcy are treated as matter of *traffic*,—A. taking out the commission—B. and C. to be his commissioners. They are considered as stock in trade, and calculations are made, how many commissions can be brought into the partnership. Unless the Court holds a strong hand over Bankruptcy, particularly as administered in the *country*, it is itself accessory to as great a nuisance as any known in the land, and known to pass under the forms of its law.” In one of the cases which drew forth these strong observations of His Lordship, the solicitor who sued out the commission actually united all the

Where there is a competition among the creditors for a *country*, and for a *town* commission, the proper practice is to make a special application to the Lord Chancellor, to direct that to issue which is most convenient for the general benefit of the creditors; and notice of the application should be given to the opposite party. But though the Chancellor will, when two dockets have been struck, direct that to be proceeded on, which is most for the convenience of the creditors at large, — yet where a commission has once issued, it will not be superseded, on the ground of its being inconvenient to any class of creditors, with respect to *residence* merely. (1) If there is no competition, the practice is merely to apply at the Bankrupt office for a *country* commission, giving in the names of the commissioners; and the Lord Chancellor will not interfere in making any order on the subject. (2) It is not sufficient, in support of the application for a country commission, (when it is opposed,) to state merely in the affidavit, that the major part in value of the creditors do not live within fifty miles of London, but at a certain town in the country; the affidavit ought to be more particular, as to the respective amount of the London and the country debts. (3)

*Country  
commis-  
sion.*

Practice,  
in case of  
a competi-  
tion.

Any person, though he is *not a solicitor*, may sue out a commission of bankruptcy. (4)

Who may  
sue out a  
commis-  
sion.

The bankrupt should, of course, be described by his *right name* in the commission; but though there is a mistake in the spelling of the name, yet if it is *idem sonans*, the variance will not be material. (5) And it was held no objection to a commission, that the bankrupt was described as *Robert MARTIN Jackson*, though his real name was only *Robert Jackson*, the name of *Martin* having been assumed by him. (6) But where there are *two* commissions

Descrip-  
tion of  
bankrupt.

characters of *Solicitor, Commissioner, Banker, and Assignee*; and Lord Eldon ordered that he should never be permitted to take out another commission. 6 Ves. 1. et seq.

(1) *Ex parte Fellows*, 2 Mad. 141.

(2) *Ex parte Bowdler*, 1 Rose, 48.

(3) *In re Child*, Buck. 425.

(4) *Ex parte Smith*, 19 Ves. 475.

(5) *Ex parte Ward*, 1 Rose, 314.

*In re Baldwin*, 2 Rose, 20.

(6) *Ex parte Smith*, 2 Rose, 25.

Description.

issued, one by his *wrong* name (though the very one he was in the habit of using) and the other by his *right* one—the latter will be preferred. (1) And where there is a doubt how the bankrupt spells his name, and the case is urgent, the Court will make an order that the commission shall issue against him, described with an alias, — thus: “J. *Stevenson*, otherwise J. *Stephenson*.” (2) The omission to describe the bankrupt as *surviving partner*, when the commission is sued out on a joint debt due from him and his deceased partner, does not seem to be important. (3)

Variance,  
when  
material.

The bankrupt's *place of abode* should also be correctly described in the commission, — though, if he is well known by the description, a trifling mistake in this respect will not be material; — such as describing his residence to be “of Finsbury Square, in the *city of London*,” instead of “the *county of Middlesex*.” (4) But a commission against J. G. of Cophall *Buildings*, instead of Cophall *Court* (5), or against J. N. of A. in the parish of *Hope*, instead of the parish of *Tidswell*, have been held bad. So where the bankrupt is described as of *two* places, when in fact he only belonged to *one*. (6)

How the  
trading  
should be  
described.

It is usual in practice to describe the bankrupt in the commission, by the particular trade he was known to follow; though the terms “dealer and chapman,” or any thing tantamount, are alone sufficient. (7) Thus a scrivener has been held to be sufficiently described by the words “dealer (8) and chapman.” And the general statement under those words — or that he “got his living by buying and selling,” will admit of any particular trading (9), or indeed of any other trading, though different from that specifically mentioned in the commission. (10) But when the

(1) Ex parte *Schofield*, 2 Rose, 246.; and see *Stevens v. Elizée*, 3 Camp. 256.

(2) *Stevenson's case*, 19 Ves. 277.

(3) In re *Baldwin*, 2 Rose, 20.

(4) Ex parte *Smith*, 1 G. & J. 256.

(5) In re *Gordon*, 1 Mont. Dig. 78.

(6) Ex parte *Marston*, *ibid*.

(7) Ex parte *Herbert*, 2 Rose, 248. 2 V. & B. 399. *Hale v. Small*, 2 B. & B. 28.

(8) *Kemp v. Neville*, 5 Moore, 23.

(9) Ex parte *Herbert*, 2 Rose, 248.

(10) *Hale v. Small*, 2 B. & B. 25.

general words are altogether omitted, — then, indeed, evidence cannot be given of any other trading than what is specified. (1) Amendment.

A commission, before it is issued, is considered in the nature of an *escrow*, and a clerical error may be corrected; but the Lord Chancellor will not permit the *teste* to be altered, or the commission resealed, in order to let in a subsequent act of bankruptcy, where the petitioning creditor is unable to prove an act of bankruptcy prior to the date of it. (2) And where a commission is permitted to be resealed, there must be a new docket, — that is, there must be a new bond given, and the affidavit must be re-sworn. (3) But when the commission has once been *opened*, it has been laid down hitherto as a strict rule, that it cannot be *amended or resealed*, even to correct a mere clerical error; and that the only remedy is to supersede it, and issue another. (4) There does not now, however, seem to be any great reason for so inflexible an adherence to this rule; — for the principle on which it appears to have been founded was, that any alteration of the commission would be a fraud upon the revenue laws; but the *commission* now, as well as the *bond, affidavit, and petition*, are all exempted from any stamp duty. Another reason has been also assigned for the rule, which is, that by resealing the commission, a party, against whom it had improperly issued, might be defeated of his right of action. (5) But this reason, it is apprehended, will not apply to a trifling mistake, or mere clerical error, — in respect of which, without any other ground, a court of equity would hardly encourage a legal right of action. In one case, indeed —

When commission may be amended;

when must be a new docket.

When opened, cannot be amended.

Quære tamen, Whether this rule inflexible?

Relaxed when error arose from act of the officer.

(1) Ibid. 3 Moore, 63. Ex parte Small, 2 Wils. Ch. Rep. 85.

(2) Ex parte Cheesewright, 1 Rose, 228. 18 Ves. 480.

(3) Ex parte Sutton, 1 Rose, 85. In re Rutledge, 2 Rose, 369.

(4) Ex parte Thompson, 9 Ves. 225. Fisher's case, 10 Ves. 190.

Burrow's case, ibid. 286. Ex parte Thwaites, 13 Ves. 325. Ex parte

Lee, 1 Cox, 394.

(5) 10 Ves. 191.



*Description.*

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Vari  
wh  
mat

officer at the Bankrupt office, in  
in the affidavit for the docket—  
ordered the commission to be made  
affidavit (1); such an amendment, how-  
ever, when the error was created by the

that to be executed in a reasonable time  
and it is an abuse of it to delay the pro-  
cess with a view to another arrangement. (3)  
a general order of Lord Loughborough (4),  
a commission is not proceeded in for  
after the date of it, or a *Country* commission  
days, either of them may be superseded.  
However, however, must elapse before the order  
can issue; and the application which  
made during that day for a new commission,  
solicitor, will be preferred to an application  
solicitor who sued out the first commission. But  
subsequent order, this preference is not to be enforced  
same solicitor, when acting as *agent* for a dif-  
ferent from the one, for whom he acted in suing  
out commission. (5)

In the construction of the first of these orders, the prac-  
tice at the Bankrupt office has been, uniformly to super-  
sede a *Country* commission, on the 30th day after it  
upon an application made for that purpose on the  
day unless notice of the adjudication is previously given  
to the office on the latter day. And even where the ad-  
judication did not take place until the 28th, and, by the  
delay of the post from the place where the commission  
was issued, it was impossible that notice of the adjudi-  
cation could reach London by the 29th, the Lord Chan-  
cellor refused to supersede a second commission, which

(1) Ex parte Guthrie, 1 G. & J.

(3) Ex parte Layton, 6 Ves. 434.

(4) 26th June 1793.

(2) Ex parte Forshaw, 1 G. & J.

(5) General Order, 5th Nov. 1793.



had been taken out by another creditor. (1) For a commission should be executed *immediately*, without waiting to the utmost limit of the time allowed by the general order; and where it happens to be against *Bankers*, there is a greater necessity for prosecuting it without delay. (2) Therefore, where the petitioning creditor applied to supersede a commission against bankers, and issue another, on the ground that the act of bankruptcy was subsequent to the date of the commission — and the solicitor had been required to state by affidavit why he took out a commission which he could not support — and pending that application another creditor obtained a supersedeas, and also a fresh commission, under the apprehension of immediate extents; — the latter commission was preferred, though the bankruptcy was afterwards declared upon acts found previous to the date of the first commission. (3)

When, to be executed.

Commission against bankers.

Proof of an act of bankruptcy, followed up by the adjudication, it seems, is a sufficient *proceeding* within the terms of the order; and it is not necessary that the advertisement of the adjudication should have appeared in the Gazette within the limited period. For the Gazette being only published twice a week, the adjudication may be frequently too late to be inserted within that period; — it would be unreasonable, therefore, to hold, that nothing but advertisement of the adjudication would satisfy the terms of the order. (4)

What a sufficient proceeding.

Advertisement in Gazette.

The strictness of the general order also, may, under peculiar circumstances, be relaxed, where there is a *bonâ fide* intention to prosecute the commission; — as in the case of the sickness of a commissioner, or a witness. (5) And although a commission has been superseded for non-prosecution, according to the terms of the order, and a second commission actually issued by another creditor, yet he is

When strictness of the order may be relaxed.

(1) Ex parte *Henderson*, 2 Rose, 190.; and see post, "Supersedeas."

(2) Ex parte *Mavor*, 19 Ves. 542.

(3) Ex parte *Mavor*, 19 Ves. 542.

(4) Ex parte *Freeman*, 1 Rose, 384. Ex parte *Ellis*, 7 Ves. 135.

Ex parte *Soppit*, Buck, 81., but see ante, 120.

(5) Ex parte *Freeman*, 1 Rose, 384.

When to  
be ex-  
ecuted.

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not entitled to the second commission as a matter of absolute right. For where, in a case of this kind, there was a *bonâ fide* intention of prosecuting the first commission, delayed only by the refusal of the witness (who could prove the act of bankruptcy) to attend the commissioners, and notice had been given to the solicitor who struck the second docket, that a petition had been presented to compel the attendance of that witness, and that the commission was intended to be prosecuted, — the second commission, under these circumstances, was directed to be superseded, and the first commission to proceed. (1) And in another case, where the commission was supersedeable under the above order, and the solicitor who took out a second commission, had previous notice that the first was to be proceeded in, Lord Eldon intimated his intention to have made the solicitor pay the costs, if the first solicitor had not in fact (under the apprehension that the first commission could not stand,) himself taken out a fresh one. (2) Where, also, the adjudication was prevented, by the witness to prove the act of bankruptcy secreting himself in concert with the bankrupt, the time has been enlarged from time to time, on petition to the Chancellor, with an affidavit of the facts. (3)

When  
time en-  
larged for  
adjudica-  
tion.

Same pe-  
titioning  
creditor  
cannot sue  
out a se-  
cond com-  
mission  
without  
special  
leave.

By a general order of Lord Thurlow (4) a petitioning creditor who has sued out one commission, and who has neglected to prosecute it, cannot sue out another without the special leave of the Lord Chancellor. And this will not be granted, when no proceedings were had under a commission sued out a twelvemonth before. (5) Lord Eldon also has directed, that a second commission should never be sent to him, without a note of what had been done

(1) *Ex parte Freeman*, 1 Rose, 380.

(2) *Ex parte Sanden*, 1 Rose, 85.

(3) *In re Hayes*, 1 G. & J. 255.

(4) 6th Dec. 1788. There is no printed or written copy of this order; but it was made upon a petition of Sir Richard Arkwright, in the matter of *Gibson and Johnson*, and was a direction given by

Lord Thurlow to Mr. Woodcock, the then secretary of bankrupts; and although the order never was published, yet it has invariably been acted upon at the Bankrupt office. Whitm. B. L. 476.

(5) *Ex parte Masterman*, 18 Ves. 298. 2 Rose, 442.; and see 1 Rose, 333. (note.)

in the first (1) For where there is great delay in executing a commission, there arises necessarily a presumption of fraud (2); and though no other creditor supersede the commission for want of prosecution, yet, after a considerable lapse of time, the Court will not permit the petitioning creditor to proceed (3) upon it. But where the delay arose from the bankrupt, and not from the petitioning creditor, a commission was in that case ordered to be opened near four months after it had issued. (4) In such a case, however, the delay must be *against the will* of the petitioning creditor; for if the delay be wilful, it is not a sufficient excuse, that it was at the request of the bankrupt, and with the concurrence of the creditors. (5)

When to be executed.

Where delay arose from the bankrupt.

A commission supersedable under the above orders of Lord Loughborough may (6) be superseded by any persons (except the bankrupt or the petitioning creditor), as a matter of course, by mere application at the Bankrupt office; but the *bankrupt* (7) or the *petitioning creditor* (8) cannot supersede without a petition.

Who may supersede.

## SECTION II.

### *Of the general Effect of the Commission.*

A commission of bankrupt was formerly treated as an *execution* at law in the first instance (9); and it is still considered in the nature of an execution, being a process for all creditors, legal and equitable, against a debtor's estate and effects, to which he is either entitled in his own right, or jointly with that of others. (10) It is, indeed, so far like an execution, that it may be issued against *one* only of several partners for a *joint* debt (11); but it differs from an

Distinction between commission, and execution.

(1) 1 V. & B. 34.

(2) 1 Rose, 384.

(3) Ex parte Puleston, 2 P. Wms.

545. Ex parte Smith, 1 Rose 322.

(4) Harrison's case, 3 V. & B. 174.

(5) Ex parte Luke, 1 G. & J. 361.

(6) 26th June 1793.

(7) Ex parte Gale, 1 G. & J. 43.

(8) Ex parte Stokes, 7 Ves. 408.

and see Ex parte Thomson, 1 Ves. 157.

(9) Twiss v. Massey, 1 Atk. 67.

Ex parte Wilson, ibid. 153.

(10) Ex parte Stocks, 3 V. & B. 107.

(11) Ex parte Crisp, 1 Atk. 134.

Crispe v. Perritt, Willes, 467.

Ex parte Ackerman, 14 Ves. 604.

Ex parte Dewdney, 15 Ves. 499.

**Effect, &c.**

execution in this respect — that whilst the latter only passes what the sheriff actually seizes, a *commission*, followed by an assignment, vests in the assignees all the rights and possibilities of the bankrupt, which he possessed at the time of the act of bankruptcy. (1) The property also taken under a commission is not disposed of, like that seized under an execution, for the benefit of the *individual creditor* suing it out; but falls immediately under the administration of the Lord Chancellor, for the purpose of equitable distribution amongst (2) *all* the creditors.

Does not  
abate suits  
pending;

A commission, *before* it is opened, it has been already observed, is considered as a species of *escrow* (3); and *after* it is opened, it does not operate in abatement of any pending action or suit, brought either by or against the bankrupt; therefore if he has commenced an action without having any excuse for it, the commission, though followed up by adjudication and subsequent proceedings, will not

nor revoke  
a submission to arbitration;

protect him against the consequences of such action. For the same reason, the commission does not operate as a revocation of a submission by the bankrupt to arbitration, notwithstanding the award was not made till after the act of bankruptcy, on which the commission is founded. (4) A decree, also, of the Court of Chancery, for a receiver of the bankrupt's estate, is not superseded by a commission; for the appointment of a receiver is a discretionary power, which is exercised by the Court merely provisionally, and does not affect the rights of parties. (5)

Does not  
work a forfeiture in a lease, &c.;

A commission does not work a forfeiture under a general clause in a lease, or a will, against alienation; for Bankruptcy, being an assignment by *operation of law*, is considered not an alienation within the meaning of such a restraint, which is confined to direct and voluntary alienation by the *act of the party*. (6) Neither does a commission operate as a complete revocation of a devise of real

nor a complete revocation of a devise.

(1) *Ex parte Brown*, 2 Ves. 68.; and see *Lee v. Lopes*, 15 East, 230.

(2) *Ex parte Elton*, 3 Ves. 239.

(3) *Fisher's case*, 10 Ves. 190.

(4) *Andrew v. Palmer*, 4 B. & A. 250.

(5) *Skip v. Harwood*, 3 Atk. 564.

(6) *Doe v. Bevan*, 3 M. & S. 353.

*Wilkinson v. Wilkinson*, G. Cooper's Cases, 259.; and see post, "Assignment."

estate, for the law takes the property out of the bankrupt Effect, &c.  
only for the purpose of paying his creditors; and as soon  
as that is done, the assignees under the commission are  
then mere trustees for the bankrupt, and can be called  
upon to convey to him. (1)

A commission renders invalid and nugatory (2) all pay- When  
ments and contracts of the bankrupt, which were not made payments,  
by him more than two calendar months before the issuing of &c. invali-  
the commission, except (3) *payments to creditors* of the dated;  
bankrupt, really and *boná fide* made before the date and  
issuing of the commission, and *before notice* of any prior act  
of bankruptcy. And a commission, though superseded (4),  
yet if followed up by a second commission within two  
months after it is superseded, produces the same effect.

The mere issuing of a commission, however, without of no effect  
any thing further done under it, does not affect the rights when not  
or property of the person who is the subject of it, or of any in legal  
person who may be connected with him. Therefore a prior operation.  
commission, which has never been acted upon, (though  
it has not been superseded,) will not invalidate a second  
commission, which has been regularly proceeded with; the  
first being considered as never in legal operation. (5)

If the person against whom a commission is issued dies When it  
*before* adjudication, the commission then abates and becomes abates by  
absolutely void; notwithstanding the commissioners may death of  
have so far dealt with it as to have received proof of the pe- party;  
titioning creditor's debt, and the trading; for the party must  
be *declared* a bankrupt *before his death*, to authorize any  
further proceedings. (6) But if he dies *after* adjudication,  
in that case the commissioners may proceed in the commis-  
sion as if he were living (7); and a commission is declared not by a  
not to abate by reason of a demise of the crown. (8) demise of  
the crown.

(1) *Charman v. Charman*, 14 Ves. 176. 2 Moore, 71. Ex parte *Bul-*  
390. *ler*, 1 Rose, 136.

(2) Section 81.; and see post, (6) Ex parte *Beale*, 2 V. & B. 29.

"Relation."

(3) Section 82.

(4) Section 81.

(5) *Warner v. Barber*, 8 Taunt. 15 Ves. 494. Ex parte *Dewdney*,  
A. 458. *Doe v. Clark*, 5 B. &

(8) Section 26.

## SECTION III.

*Of a second Commission.*

Strictly  
void,

and super-  
sedable.

Permitted  
to stand in  
case of  
fraud,  
*laches*, or  
acquies-  
cence of  
creditors  
under the  
first.

A *second* Commission issued against a Bankrupt before he has got his certificate under the first (provided the first has been put into legal operation) is, strictly speaking, void at law; for an uncertificated bankrupt is incapable of trading, or contracting *effectually*, for his own benefit, — all the property he acquires being affected by the assignment, and vesting in his assignees. (1) Two commissions, therefore, cannot subsist together for the same purpose; and in general the second will be superseded. But the Lord Chancellor will always exercise a discretion on the subject, and support that commission which is most convenient, by superseding the other. (2) And we have just seen that a commission, which has not been put into any legal operation, will not invalidate a second commission; for no property *actually* passes under a commission before assignment. (3)

Under some special circumstances also, as where there has been fraud, or *laches*, in the creditors under the first commission, the Lord Chancellor has refused to supersede a second commission, notwithstanding the first has been prosecuted to a certain extent; as where it appeared that the creditors under the first had signed the certificate under the second, and acquiesced under it for a considerable time. (4) And so where fifteen years had elapsed since the first commission, during all which time the bankrupt (who was the son-in-law of the petitioning creditor

(1) *Ex parte Proudfoot*, 1 Atk. 251. *Martin v. O'Hara*, Cowp. 823. *Ex parte Brown*, 2 Ves. 67. 4 Bro. 210. *Ex parte Bold*, C. B. L. 12. *Ex parte Leicester*, 6 Ves. 426. *Everett v Backhouse*, 10 Ves. 54. *Ex parte Martin*, 15 Ves. 114. *Butt v. Bilke*, 4 Pri. 240.

(2) *Ex parte Layton*, 6 Ves. 434. *Ex parte Hardwicke*, *ibid.* *Ex parte Lees*, 16 Ves. 472., and see ante, 122., and post, "Supersedeas."

(3) Ante, 125.

(4) *Ex parte Proudfoot*, *supra*; and see ante, 122. et seq.

under the first commission) had been permitted to carry on trade in another place. (1) And, where the creditors under the first commission had, by a contract of composition, placed themselves in such a situation as to prevent the legal operation of the commission, Lord Eldon said, he would not suffer them to defeat the fair claim of creditors under the second commission. (2)

With respect to a *third* commission, — the doctrine that has been held, that such a commission is sustainable against a bankrupt, although he has not paid 15s. in the pound under the second (3), it seems, can no longer be maintained under the provisions of the new act; for by the 127th section, all his *future estate and effects* are in such a case declared to be *vested in the assignees under the second commission*; and, therefore, there would be now no property left, upon which a *third* commission could possibly operate. No third commission, however, which subsisted before the 1st September 1825, will be affected by this provision, as all proceedings and rights under such commissions are protected under the 135th section of the new act.

As to a  
*third* com-  
mission.

Where a *sequestration in Scotland* is awarded against a party domiciled there, and a commission of bankrupt is issued against the same party, by reason of his being domiciled also in England, the sequestration has the preference, — if the petition for the sequestration was before the issuing of the commission — notwithstanding the act of bankruptcy in England was committed before the petition for the sequestration, and the latter was not finally awarded till after the issuing of the commission. (4)

When  
Scotch se-  
questra-  
tion has a  
preference  
over an  
English  
commis-  
sion.

(1) *Ex parte Lees*, 16 Ves. 472.

(5) *Ex parte Baker*, 1 Rose, 452.

(2) *Ex parte Bullen*, 1 Rose, 134.; and see *Ex parte Crew*, 16 Ves. 236. *Ex parte Rhodes*, 15 Ves. 543.

*Ex parte Hodgkinson*, 2 Rose, 172. G. Coop. 99.

(4) *Ex parte Geddes*, 1 G. & J. 414.

## SECTION IV.

*Of a joint Commission. (1)*

Former  
practice as  
to com-  
missions  
against  
partners.

It was formerly the practice, where there were several partners, to take out separate commissions against each, as well as a joint commission against all; for it was holden that a *joint creditor* could not avail himself of any distribution of the property of one partner under a *separate commission*. (2) This practice, however, has been long exploded; as it created great confusion and expense with regard to the effects of the bankrupt, and was, indeed, in itself unreasonable and inconsistent — a second commission against the same individual, pending the working of the first, being, as we have seen, void at law. (3) It has now, therefore, been some time settled, that a *joint creditor* can not only prove his debt under a separate commission, but may also himself sue out a *separate commission* against any one of several partners. (4) But he could not, until lately, have sued out a commission against *two* of *three* partners (5), any more than an action at law on a bond can be sustained against two out of three joint and several obligors — which must either be brought against *all jointly*, or *each one separately*.

Under a joint commission, too, it was necessary that *each* of the partners included in it should be found bankrupt; for a commission, void as to one partner, was not sustainable against another. Thus, where one partner was dead at the time a joint commission was taken out, it was held to abate, and be absolutely void (6); though, as we

(1) And see post, "Partners."

(2) 1 Atk. 138.

(3) Ante, 126. *Ex parte Baudier*, 1 Atk. 98. *Ex parte Cook*, 2 P. Wms. 500.

(4) 1 C. B. L. 9. *Crispe v. Per-ritt*, Willes, 467. *Ex parte Dewdney*, 15 Ves. 499.

(5) *Allan v. Hartley*, C. B. L. 7.

*Allen v. Downes*, Willes, 474. note

(b). *Ex parte Layton*, 6 Ves. 454.

*Ex parte Henderson*, 4 Ves. 163.; and see *Streatfield v. Halliday*, 3 T. R. 433.

(6) *Beasley v. Beasley*, 1 Atk. 97. *Ex parte Martin*, 15 Ves. 115.



have seen, this is not the case where he does not die, till after the adjudication. *Joint Commission.*

To remedy this latter inconvenience, the 16th section of the new statute (which continues the provision of the 3 Geo. 4. c. 81. s. 8.,) declares, that a joint creditor may sue out a commission against *one or more* partners of a firm, though it does not include *all* the partners. And in any commission against two or more partners, the Lord Chancellor may supersede it as to one or more, without affecting its validity as to any partner, against whom it is not ordered to be superseded. But even now, it is apprehended, where a joint commission is *void* as to one partner, it cannot operate against the other at law,—unless it has been previously superseded by the Lord Chancellor, as to the partner against whom it was void; pursuant to the authority given him by the above section. (1)

*Joint creditors may sue out commission against one or more partners. May be superseded as to one, and stand against the rest.*

A joint commission has been sustained, on a debt contracted many years after a nominal dissolution of a partnership, where the sale of goods, which were the joint property of the partners, was continued after such dissolution. (2)

Although a joint commission is, in strictness of law, a nullity as to those partners against whom separate commissions have been previously issued, yet, if it can be made to appear, that the estate of the bankrupts will be benefited by prosecuting the joint commission, the Lord Chancellor has long exercised the discretion of superseding, or suspending, the prior separate commissions, and ordering the joint commission alone to be proceeded with; under which latter commission the assignees can, at law, recover both the joint and separate estates, and the same distribution will be then made, as if both the joint and separate commissions were permitted to stand. (3) But this discretion will be only exercised,

*When joint commission preferred to prior separate commissions.*

(1) See *Hogg v. Bridges*, 2 Moore, 122. L. 9. 1 Cox, 397. *Ex parte Martin*, 15 Ves. 115. *Ex parte Smith*, 1 G. & J. 256. *Ex parte Bonbonus*, 8 Ves. 540. *Ex parte Gardner*, 1 Ves. & B. 74.

(2) *Backhouse v. Tarleton*, 2 Star. Ev. 143, cit. 2 Swanst. 571.; and see ante, 31. et seq.

(3) *Ex parte Hardcastle*, 1 C. B.

**Joint Commission.**

**Prior commission in Ireland.**

**Petitioning creditor under separate commission, allowed the costs of superseding;**

**and restored to his right of election.**

**When separate commission impounded.**

where it is clear that more ample justice can be obtained under the joint commission. (1) It is not, however, a sufficient objection to superseding the separate commission, that a separate creditor to a great amount will by that means be divested of his right of voting in the choice of assignees. (2) Neither is a prior separate commission, issued in Ireland against one of two partners, a ground for superseding a joint commission issued against them in this country. (3)

When a prior separate commission is superseded to give effect to a subsequent joint one—as this proceeding is not a matter of strict right, but for the convenience and general advantage of all the creditors—it is deemed but just, that the petitioning creditor under the separate commission should be indemnified for the expenses of this proceeding. Therefore, unless he has been acting *malá fide*, he receives all the costs of the superseding out of the joint estate. (4) And when a separate commission is thus superseded, every thing done under it falls with it. Thus where a joint and separate creditor sues out a separate commission, and proves his debt under it, he is, upon the *supersedeas*, restored to his right of election to prove against the joint estate; and he has also a right to elect, out of which estate he will be paid the costs of the *supersedeas*. (5) When, however, a separate commission is taken out *after* a joint one, and after the petitioning creditor had previous notice of the joint commission, in this case, the separate commission will be superseded at the expense of the petitioning creditor. (6)

But though it lies in the discretion of the Lord Chancellor to supersede a prior separate commission, and this in any stage of the proceedings, and whether the bankrupt has got his certificate under it or not (7); yet where sales

(1) Ex parte *Rawson*, 1 V. & B. 160.

(2) Ex parte *Pachelor*, 2 Rose, 26.

(3) Ex parte *Cridland*, 2 Rose, 164.

(4) Ibid. Ex parte *Brown*, 1 Rose, 432. 1 V. & B. 60.

(5) Ibid.

(6) Ex parte *Mason*, 1 Rose, 493.

(7) Ex parte *Cutten*, Buck. 68. Ex parte *Pool*, 2 Cox, 227. Ex parte *Gillam*, Ibid. 193.

of the effects have taken place, or the bankrupt's certificate has been brought into the Bankrupt office for allowance, the Lord Chancellor will then sometimes, in preference to superseding it, direct it to be impounded in the Bankrupt office. (1) By this mode of proceeding, whilst full effect is given to the working of the subsequent joint commission, the sales and certificate under the separate one are, at the same time, prevented from being rendered invalid. And generally, where superseding the separate commission might prejudice transactions that have taken place under it, the Lord Chancellor will, if the convenience of administering the partnership fund makes it better that the joint commission should stand, so dispose of the first commission (without superseding it), as to prevent its being an impediment to the prosecution, or validity, of the subsequent joint commission. (2) Even a court of law has exercised a species of equitable jurisdiction in this respect; as where the assignees under a prior separate commission obtained a verdict against a defendant—upon its appearing that there was a subsequent joint commission—it was ordered that the money should be paid into court, until a petition to supersede the separate commission then pending had been decided. (3)

*Joint Commission.*

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Under some circumstances the joint commission will be superseded, and the separate one preferred; as where a joint commission was not taken out for *five months* after a separate one had issued, and there did not appear to be any joint effects. (4) And a separate commission will not be superseded upon the petition of joint creditors, if they suffer a considerable time to elapse, without obtaining an order to prove, for the purpose of assenting to, or dissenting from, the certificate,—and more especially, if the certificate under the separate commission is actually lying for confirm-

When the separate commission will be preferred.

Laches of joint creditors.

(1) *Ex parte Rowlandson*, 1 Rose, 415. *Ex parte Tobin*, 1 V. & B. 308. 1 Rose, 431. note (a). *Ex parte Rawson*, 1 V. & B. 160.

(2) *Ex parte Mason*, 1 Rose, 433. *Ex parte Wilson*, Buck. 52.

(3) *Hodgkinson v. Travers*, 1 B. & C. 257.

(4) *Ex parte Rowlandson*, 1 Rose, 89. *Ex parte Hamper*, 17 Ves. 403. . .

**Joint Commission.**

ation, and no misconduct is imputed to the bankrupt. (1) Where, also, a separate commission was sued out against one of two partners, who was adjudged a bankrupt, and then the other partner died before assignment, and afterwards a second commission was taken out against the bankrupt partner, describing him as *surviving* partner, — the first commission was supported in preference to the second, the adjudication being considered as the act which severed the partnership. (2)

**Where the bankrupt has committed a felony by not surrendering.**

A separate commission will not be superseded to give effect to a subsequent joint one, where the bankrupt has committed a felony, by not surrendering to the separate commission (3); unless, indeed, the omission to surrender proceeded merely from mistaken advice, and not from any fraudulent intent. But under such last mentioned circumstances — and where it appeared also that the bankrupt had surrendered, and passed his examination under the joint commission — Lord Eldon superseded the separate commission upon the petition of the bankrupt, even after a prosecution had been instituted against him. (4)

**Usual order for distinct accounts, &c.**

Under a joint commission, it is the practice of the Court to make an order, (which may be obtained now without a petition,) that the assignees shall keep distinct accounts of the several estates, and that the separate creditors may come in and prove their debts. (5) And if any proceedings have been had under a separate commission which has been superseded, they are generally ordered to form part of the proceedings under the joint commission, and the proofs taken under the former commission are directed to be received as proofs under the other. (6)

**Where separate commission issued, after a**

By section 17. of the new act, where a commission is issued against two or more members of a firm, and afterwards a commission is sued out against any other of the partners, the last commission must be directed to the same

(1) *Ex parte Cutten*, Ruck, 68.

(5) 1 Atk. 139.

(2) *Ex parte Smith*, 5 Ves. 295.(6) *Ex parte Tobin*, 1 V. & B.(3) *Ex parte Roberts*, 2 Rose, 578.308. *Ex parte Upham*, 17 Ves.(4) *Ex parte Lavender*, 18 Ves. 812.

18. 1 Rose, 55.

commissioners as those in the first commission; and immediately after the adjudication under the second commission, the commissioners are directed to convey and assure all the bankrupt's estate to the assignees chosen under the first commission; and after such conveyance, all separate proceedings under the second commission are directed to be stayed; and the second commission, without affecting the validity of the first, is to be annexed to and form part of the same. The Lord Chancellor has, however, the power to direct the second commission, if he thinks fit, to be issued to any other commissioners than those named in the first; and also to order such second commission to proceed either separately, or in conjunction, with the first commission.

*Joint Commission.*

joint commission against others of the partners.

## SECTION V.

### *Of renewed and auxiliary Commissions.*

If more than two of the commissioners should die—by which means there would not be a sufficient number to act,—or if the commission should be lost,—it may in either of these cases be *renewed*; on which occasion only half the usual fees on granting commissions are payable.(1) Where, however, the creditors have been paid the full amount of their debts, there cannot be a renewed commission. In such a case, therefore, where all the commissioners were dead, the representatives of the surviving assignee were ordered to execute a power of attorney to a receiver, appointed under a decree of the Court of Chancery in a cause, by virtue of which he was deputed to collect and get in the estate.(2)

When commission may be renewed;

when it cannot.

*Auxiliary* commissions for the proof of debts under 20*l.* were, before the present statute, issued by the Lord Chancellor; but there was no power granted under such com-

*Auxiliary commissions.*

(1) Section 26. of the new act, from 5G. 2. c. 30. s. 44. *Ex parte Hobbs*, Buck. 132. *Backwell's* case, 1 Vern. 208. *Ex parte Haliday*, 7 Vin. 77.  
(2) *Twogood v. Hankey*, Buck. 65.

missions to examine the bankrupt. (1) But now by sect. 20. of the new act, the Lord Chancellor is empowered to issue auxiliary commissions, both for proof of debts under 20*l*. and for the examination of witnesses upon oath, or for either of these purposes. And the commissioners in every commission of this description are clothed with the same powers to compel the attendance of, and to examine witnesses, &c. as are possessed by the commissioners in the original commission. The examination of witnesses under such commissions is directed to be in writing, and to be annexed to and form part of the examinations under the original commission.

### SECTION VI.

#### *Remedy where Commission is maliciously sued out.*

Assign-  
ment of  
the bond  
to the  
Chan-  
cellor.

By the 13th section (2) of the new statute, if the commission is issued fraudulently or maliciously, and without foundation, the Lord Chancellor may, upon the petition of the person against whom it was taken out, order satisfaction to be made to him for the damages sustained; and for the better recovery thereof may assign the petitioning creditor's bond (3) to him, upon which he may afterwards sue in his own name.

When it  
will be im-  
mediately  
assigned.  
When  
after a

Where the case is attended with any flagrant circumstances, the bond will be immediately assigned (4) (without further inquiry) to "*the person against whom the commission was taken out.*" (5) But when the Bankruptcy is a doubtful

(1) *Ex parte Perry*, 1 Rose, 12. *Ex parte Scott*, Ibid. *Ex parte Upham*, 17 Ves. 212.

(2) From 5 G. 2. c. 30. s. 23.

(3) The provision for a bond to the Chancellor, and the assignment of it to the petitioning creditor, was *first* introduced by the 5 Ann. c. 22., which statute expired very soon after its enactment.

(4) *Ex parte Gaylor*, 1 Atk. 144.

(5) These words, it seems, were

inserted in the act, instead of the words "party grieved," (which was the expression in the 5 G. 2. c. 30.) in order to remove certain doubts, raised by the case of *Smithey v. Edmonson*, 3 East, 22. as to the right of any other person, than the one against whom the commission was issued, to call for an assignment of the bond. (See Eden, B. L. 64. note (a)). But it has been determined since that

case, it is in the discretion of the Lord Chancellor, either to direct an inquiry before the Master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law; and after the damages are settled, the Chancellor may then, for the better recovery of them, order the bond to be assigned. (1) Sometimes, when the case is one of strong suspicion only, the Lord Chancellor will not assign the bond, though he will supersede the commission with costs, without prejudice to an action; for the power to assign the bond is confined to the case of *malice* (2); of which, indeed, the assignment itself is conclusive evidence (3), and neither more nor less than the penalty can be recovered. When, however, the conduct of the petitioning creditor, though highly improper, is not such as to justify an assignment of the bond, the Lord Chancellor will sometimes order the bond to stand as a security for the damages, to be ascertained in an issue; but in one case of this kind, where the petitioning creditor became bankrupt himself, Lord Eldon named a specific sum, to obviate the objection that the damages so ascertained would be a debt liquidated after the bankruptcy. (4)

*Remedy,  
&c.*

previous  
inquiry.

Assign-  
ment con-  
clusive  
proof of  
malice.

When  
bond will  
be ordered  
to stand as  
a security.

The assignment of the bond being conclusive evidence of *fraud*, or *malice*, it is not necessary, in an action *on the bond*, to aver in the declaration, that the commission was fraudulently or maliciously sued out. (5) And where the defendant in such an action pleaded, that the Lord Chancellor had previously ordered a certain sum to be refunded by the defendant, and the costs of the plaintiff to be also paid by him, and then averred payment of such sum, and the costs, before the suing out of the plaintiff's writ, in satisfaction of the damages sustained by the bankrupt's estate; and that neither the plaintiff, nor the bankrupt's estate had sustained any other damage *ultra* the sums so

Actions on  
the bond,  
what need  
not be  
averred.  
What plea  
bad.

case, that a creditor aggrieved by the issuing of a fraudulent commission, was not entitled to an assignment of the bond. (Ex parte *Bamford*, 2 Madd. 1.)

(1) *Ibid.*

(2) Ex parte *Lane*, 11 Ves. 415.

(3) Ex parte *Gaylor*, *supra*.

(4) Ex parte *Rimenc*, 14 Ves. 600.

(5) *Smith v. Broomhead*, 7 T. R. 300. *Holmes v. Wainwright*, 1 Swanst. 23.

*Remedy,  
&c.*

---

Bond not  
within the  
8 & 9 W. 3.

Party not  
deprived  
of his  
action on  
the case;

but that is  
a waiver of  
the action  
on the  
bond.

paid to the plaintiff; — it was held, that this plea was no answer to the action; for the order of the Lord Chancellor assigning the bond implies, that the whole penalty of the bond was assigned to the plaintiff, by way of satisfaction in damages for the injury sustained. (1) It is competent, however, to the Lord Chancellor under these circumstances to review his former order, and to direct either the whole, or any part, of the penalty to be applied accordingly. The bond is not within the statute 8 & 9 W. 3. c. 11. s. 8., by which a jury is to assess the damages; for the damages in this case are to be ascertained by the Lord Chancellor, though he may assist his conscience, either by directing an inquiry before a Master, or an issue at law. (2)

But notwithstanding the above provision in the statute for the assignment of the bond, the party, against whom a commission is maliciously sued out, is not deprived of his common law remedy by an action on the case against the petitioning creditor; and this mode of proceeding will indeed sometimes afford more satisfactory redress to the injured party, than an action on the bond, — inasmuch as a jury are not limited to the amount of the penalty of the bond, but may give any damages which they may think the plaintiff is justly entitled to. (3) An action of this description, however, is a waiver of a right of action on the bond. (4) In such an action the solicitor should not be joined as a defendant; for in a case of this description, though the plaintiff gave in evidence, that the messenger had taken possession of his property by the orders of the solicitor, it was held, nevertheless, by Macdonald C.B., that there was no satisfactory ground of action against the latter, who was professionally bound to act as he had done. (5)

(1) *Smithey v. Edmonson*, 3 East, 22. 91. *Ex parte Fletcher*, 1 Rose, 454.

(2) *Ibid.*

(4) *Holmes v. Wainwright*,

(3) *Brown v. Chapman*, 3 Burr. 1418. *Chapman v. Pickersgill*. 1 Swanst. 20.

(5) *Smith v. Gainsford*, 1 Rose, 148. n.

2 Wils. 145. *Bonham's case*, 8 Rep. 121. *Wydown's case*, 14 Ves. 90,



Whenever the circumstances of the case justify the interference of the Lord Chancellor, he will, whether he directs an assignment of the bond or not, order the commission and the proceedings to be delivered up on oath to the Secretary of Bankrupts, for the purpose of being produced at the trial of any action or indictment, that may be brought against the petitioning creditor, or other party implicated in suing out the commission; and will permit the bankrupt, or his solicitor, to take such copies of them as they shall be advised. (1) But a judge, it seems, has no authority to make an order for the bankrupt to inspect and take copies of the proceedings, notwithstanding they remain in the hands of the attorney who sues out the commission. (2) The allegation in any such action that the commission was duly superseded, can only be sustained by the production of the writ of *supersedeas*; for the Lord Chancellor's *order* directing a *supersedeas* to issue, is imperfect evidence that the *writ* was actually issued. (3) It is a fatal variance, also, to allege that the defendant sued out the commission *out of the High Court of Chancery*; for the commission does not issue out of the Court of Chancery, though signed by the Lord Chancellor,—but under the Great Seal of Great Britain, by virtue of the act of parliament giving special jurisdiction to the Lord Chancellor in matters of Bankruptcy. (4)

*Remedy, &c.*

As to deposit of proceedings.

A judge has no authority to order copies.

Allegation of *supersedeas*.

What a fatal variance.

If it appear, that persons have conspired together in the issuing of a fraudulent commission, Lord Eldon has declared, that in such a case he would direct the necessary documents to be laid before the Attorney-general, with a view to the institution of criminal proceedings against the parties. (5) But the offence may also be prosecuted either by indictment, or information, without recourse to the Attorney-general. (6)

Conspiracy to issue a fraudulent commission.

(1) *Ex parte Warren*, 1 Rose, 276. 19 Ves. 162.

(4) *Ibid.*

(5) *Ex parte Emery*, Buck. 422.

(6) *Ex parte Cawthorn*, 19 Ves.

(2) *Ibid.*

(3) *Poynton v. Forster*, 3 Camp. 260.

## CHAP. VI.

## OF THE MEETING TO OPEN THE COMMISSION.

Preliminary proceedings to the adjudication.

As soon as the commission is sealed, three of the Commissioners ought to be summoned by one of the messengers in Bankruptcy to attend a private meeting, for the purpose of opening the commission. After it is opened, the commissioners, before they can act under it, must qualify themselves by taking the oath directed by the statute (1), which they are required to administer to one another; — and a memorial of which must be signed by them, and entered among the proceedings under the commission. They then proceed to receive proof of the petitioning creditor's debt, the trading, and the act of bankruptcy (2); each of which ought to be made out to their satisfaction, previous to their declaring the party bankrupt.

Petitioning creditor must attend in person.

The petitioning creditor—or if there is more than one, then all of them—must attend in person (3) before the commissioners to prove the debt or debts, upon which the commission has issued. And before the commissioners declare the party bankrupt, they are required to enter on their proceedings a deposition of the petitioning creditor, stating the nature and amount of the consideration, and the time of accruing of the debt. This order must be strictly adhered to, and the commissioners are not to depart from it (even in cases where it is impossible for the creditor to attend) without the special order of the Lord Chancellor,—which will only be obtained in a case of imperative necessity, and will not be made

(1) Section 31.

(2) See Vol. II.

(3) General Order of Lord Loughborough, 26th Nov. 1798. See also 17 Ves. 415.

merely on the ground of the attendance of the petitioning creditor being inconvenient to himself. (1) But where the party is so ill that he cannot attend but at the hazard of his life, the Chancellor will in that case, upon a proper affidavit of a medical man, make an order that his personal attendance shall be dispensed with, and that the commissioners may receive an office copy of the affidavit, made on striking the docket, in proof of the debt. (2) If the petitioning creditor should die, between the issuing and the opening of the commission, his executors then will be permitted by a special order to prove the debt. (3)

The witnesses to prove the trading, and the act of bankruptcy must also personally attend (4) before the commissioners; but no witness, who is a *creditor*, is admissible to prove these facts. Neither can the *wife* of the bankrupt be examined to prove any of the requisites to support the commission. (5) But it seems, that where there is a valid objection to the competency of a witness, if it be not taken before the commissioners prior to the adjudication, it cannot afterwards be urged as an objection to the proceedings under the commission. (6) The personal attendance, however, of a witness may be, under special circumstances, dispensed with; as where a separate commission had issued against a party under which he was found a bankrupt, and afterwards a joint commission was taken out against him and his partners, and the only witness, who could prove the act of bankruptcy against him, was in Cumberland upon business of importance, — the Lord Chancellor in this case permitted the commissioners to receive an affidavit of the act of bankruptcy, made by the witness before a Master Extraordinary, upon being informed that the joint

Witnesses must personally attend.

Bankrupt's wife.

As to incompetency of witness.

Exception.

(1) *Ex parte Wilkinson*, 1 Jac. & W. 240. *In re Graham*, Buck. 47.

(2) *Ex parte Edwards*, 8 Ves. 318.

(3) *Ex parte Winwood*, 1 G. & J. 252.

(4) *Ex parte Allnut*, 1 C. B. L. 105. *Ex parte Edwards*, *Ibid*.

(5) *Ex parte James*, 1 P. Wms. 611.

(6) *Ex parte Lane*, 1 Mont. Dig. 89.

commission was directed to the same commissioners as the separate one. (1) But in a subsequent case of a similar nature, where the application was OPPOSED BY THE BANKRUPT, such an order was refused. (2)

As to the authority of the commissioners in enforcing the attendance of the witnesses to prove the trading and the act of bankruptcy, see post, Chap. VI. Sect. IV. & V.

Proof of  
lying in  
prison.

Where the act of bankruptcy consists in *lying in prison*, the usual proof of it before the commissioners is, by producing the certificate of the clerk of the papers signed by him, and proved by a witness who can depose to his signature. (3)

Duty of  
commis-  
sioners.

The evidence produced at this meeting of the commissioners being all *ex parte*, it is both their practice and their duty, to enquire minutely into the fairness of the petitioning creditor's debt, and the manner in which it arose, as well as into the facts of the trading, and the act of bankruptcy. (4) And if the result of the inquiry affords to their minds sufficient evidence, (for they are not bound to believe all that is sworn) (5) that the party has become bankrupt within the intent and meaning of the statute, they are then required to adjudge (6) him a bankrupt accordingly; that is, to declare generally (7), that he became bankrupt before the date and suing forth of the commission; and they then sign an adjudication to that effect. (8) The adjudication is so far final, that the commissioners may, notwithstanding the subsequent death of the bankrupt, proceed in the commission as if he were still living (9); but they cannot adjudicate if the party is already dead, the commission being in that case absolutely

Adjudi-  
cation.

In case  
bankrupt  
dies.

(1) In re *Wood*, 1 Rose, 298.

(2) Ex parte *Rowe*, 2 Rose, 339.

(3) 1 Mont. B. L. 403.

(4) 1 C. B. L. 103.

(5) Ex parte *Simpson*, 1 Atk. 71.

(6) Section 24.

(7) *Bromley v. Goodere*, 1 Atk.

78. Ex parte *Groome*, Ibid. 119.

(8) For the form, see Vol. II.

(9) Section 26. *Beasley v. Beasley*, 1 Atk. 97. Ex parte *Dewdney*, 15 Ves. 494. *Doe v. Clarke*, 5 B. & A. 458.

abated, and the commissioners deprived of all further authority. (1)

The Lord Chancellor has no authority to compel the commissioners to adjudicate; for they are the only tribunal, to which this particular proceeding (which is entirely discretionary on their part) has been committed by the legislature. (2) All that the Chancellor can do is, to order them to proceed generally in the execution of the commission. But where the petitioning creditor, either from the death, the absence, or the differing in opinion of the commissioners, is unable to obtain any adjudication of the bankruptcy, he will be permitted, upon application to the Lord Chancellor, to take out another commission against the bankrupt, upon the same docket papers on which the first commission issued, directed (if in London) to another list of commissioners next in turn at the Bankrupt office. (3)

Commissioners cannot be compelled to adjudicate;

but where they do not, a fresh commission ordered.

After adjudication, the commissioners are directed to cause a notice (4) thereof to be published in the next London Gazette, by which three public meetings are appointed for the bankrupt to surrender,—the last of which must be on the forty-second day after such notice (5), and after a similar notice also in writing left at the bankrupt's usual place of abode. This last-mentioned notice is in the form of a summons (6) from the commissioners to the bankrupt, requiring him to surrender,—which, if he is in prison, must be personally served upon him. (7) In some cases the Lord Chancellor has ordered the advertisement to be suspended, where the party will swear that he is really solvent, and has committed no act of bankruptcy (4); though in one case the advertisement was

Notice in the Gazette.

Notice to the bankrupt.

When advertisement suspended.

(1) *Ex parte Beale*, 2 V. & B. 29. 1 Rose, 140.      ings, were first introduced by the 4 & 5 Ann. c. 17.

(2) *Ex parte Perrin*, Buck. 510.      (5) See Section 112.

(3) *Ex parte Stead*, 1 G. & J. 301.      (6) See Vol. II.

(7) Section 112.

(4) Section 25. The notice in the Gazette, and the three meet-      (8) *Ex parte Foster*, 1 Rose, 51. 17 Ves. 414. *Ex parte Proston*,

stayed with some hesitation, upon the application of a *creditor*, accompanied even with the consent of the petitioning creditor. (1) But such an order will only be made, where, on inspection of the proceedings, no bankruptcy is found;—or, where, under a *Country* commission, it is necessary to give an opportunity of producing the evidence. (2)

As to  
bankrupt's  
surrender.

The bankrupt, if he chooses, may *surrender* at the meeting to open the commission, (without waiting for any of the public meetings,) for the purpose of obtaining an earlier protection from the commissioners. (3)

Provi-  
sional  
assignee.

If an extent is apprehended against the bankrupt's effects, or it is intended to carry on the trade, the commissioners may at this meeting appoint a *Provisional Assignee* of the bankrupt's estate (4);—whom, however, it is the practice to remove at the subsequent meeting for the choice of assignees. But a provisional assignment ought not to be executed without necessity, —for it will not in such case be allowed in the bill of costs. (5)

Warrant  
to the  
messenger.

When the commissioners have adjudged the party bankrupt, they issue their warrant to the *messenger* under the commission, for the immediate seizure of all the bankrupt's personal estate and effects. (6) As the power and authority of this officer have been considerably enlarged by the present statute, and as various rights and duties are connected with the office, it has been thought better to devote a separate chapter to the consideration of this particular subject. (7)

1 Rose, 259. Ex parte *Fletcher*, Ibid. 337. In re *Lewis*, 2 Rose, 59.; and see 17 Ves. 513.

(1) Ex parte *Ogilby*, 1 G. & J. 250.

(2) Ex parte *Tarleton*, 19 Ves. 464.

(3) Ex parte *Wood*, 18 Ves. 1. 1 Rose, 46.

(4) Section 45.

(5) Ex parte *M<sup>r</sup> Williams*, 1 Madd. 141.; and see post. "Assignees."

(6) Section 27; see Vol. II. for the form.

(7) See post, Chap. VIII.

## CHAP. VII.

## OF THE COMMISSIONERS.

1. *Of their general Jurisdiction.*
  2. *Of their Power over the Bankrupt.*
  3. *Of their Power over the Bankrupt's Property.*
  4. *Of their Power over other Persons.*
  5. *Of the Protection and Indemnity of Witnesses, and other Persons attending the Commissioners.*
  6. *Of the Custody of the Depositions and Proceedings.*
  7. *Of Actions, and other Proceedings, against the Commissioners.*
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## SECTION I.

*Of the general Jurisdiction of the Commissioners.*

THE jurisdiction of the Commissioners is derived from the Lord Chancellor, by a commission under the Great Seal, — and is, (like that of the Chancellor himself) as far as it extends, both equitable and legal; for they have full power and authority to act in many cases according to their discretion, besides being bound to act in other cases by the strict directions of the statute. There were formerly seven, and sometimes nine(1), commissioners in each commission; but for a long time past the number has been limited to five, who are all appointed and removable at the pleasure of the Lord Chancellor. The place of a commissioner is not one known to the law, (as Mr. Christian supposes) — but each commission is a particular authority and delegation;

Nature of  
their juris-  
diction.

Number  
of commis-  
sioners.

(1) 1 Mont. 95.

*General  
Jurisdiction.*  
—

and the appointment of *particular lists* in the metropolis is a mere arrangement, arising from the personal acts of those who have held the great seal. The number of lists may be extended, or diminished, at the discretion of the Lord Chancellor; and indeed, so recently as 1792, a new list was added by the then Lords Commissioners. Before the commissioners are capable of acting in the execution of any of the powers and authorities vested in them by the commission, they must (as we have seen (1)) take and administer to each other the oath of qualification, the form (2) of which is given in the statute. (3)

As to  
power of  
imprison-  
ment.

In certain cases the commissioners have power to issue process of imprisonment; but this power is intended not so much to punish the party, as to compel an answer (4) to questions put by them to the bankrupt and others, for the discovery of the estate and effects; — and the process they

No power  
to commit  
for a con-  
tempt;

issue is in the nature of process for contempt. But they have no power given them of committing generally for a *contempt*. Thus, in the case of any person being guilty of riotous conduct in their presence, to the obstruction of their proceedings — they are not empowered to commit the person for the contempt, but only to order him to be taken before an

or for pu-  
nishment;  
not a court  
of justice.

alderman, or justice of the peace. (5) They have indeed no power of committing for *punishment*, — for they are not considered as a court of justice (6) — and the cause of their commitment is traversable. They are in no statute, or legal proceeding, denominated Judges; and the only authority countenancing such an idea is that of Sir Edward Coke, — who entitles the sixty-third chapter of his fourth Institute, “The Court of the Commissioners upon the Statute of Bankrupts.” (7) In the context of the chapter

(1) Ante, 138.

(2) And see Vol. II.

(3) Section 21.

(4) And see *Miller v. Seare*, 2 Bl. 1141. *Perkin v. Proctor*, 2 Wils. 384.

(5) 1 & 2 G. 4. c. 115.

(6) *Kinder v. Williams*, 4 T. R. 378. 1 Ld. Raym. 467. 2 Black. 1145. 8 Co. 121.

(7) The statute of 1 & 2 G. 4. c. 115., for building offices for the meetings of the commissioners, directed the buildings, when com-



he does not say that they are Judges, but that their authority is by commission under the Great Seal; and that as their jurisdiction and power is by force of acts of parliament, they ought to be pursued, or else they are subject to the action of the party grieved.

General  
jurisdiction.

But the Commissioners are a tribunal sufficient to have their witnesses protected (1); though in this case it is rather a privilege than a protection; for *they* have not power to discharge a witness who is arrested during his attendance on them; but the witness is compelled to apply by *habeas corpus* to one of the superior courts. They have power, however, to administer an oath; and any person falsely swearing before them may be indicted for perjury. (2)

As to protection of witnesses attending them.

Where the directions of the statute for the conduct of the Commissioners are plain and positive, they ought to be strictly pursued; — but where any *discretion* is vested in them, — *that* is not subject to control. Thus the Court of King's Bench will refuse a *mandamus* to Commissioners of bankrupt, to certify the bankrupt's conformity to the Lord Chancellor; the legislature having vested a discretion in the Commissioners in that respect, with which the Court will not interfere. (3) And where the Lord Chancellor sends back to them the bankrupt's certificate, for the purpose of letting in other creditors, the Commissioners are not confined to that object, nor bound by the original certificate; but the whole is again open to their judicial (4) discretion. So, in the examination of a person as to any portion of the bankrupt's property, which may have been received by him, — they are to determine, at the hazard of an action, whether the questions are such as the person is bound to answer; and the Lord Chancellor will not interfere, by making an order upon them, to enforce answers to any particular questions (5) to be put to such person.

Discretionary power not subject to control.

pleted, to be called the "Court of Commissioners of Bankrupt;" but this of course applied only to the designation of the *place*, and not to the power of the *persons* who were to sit there.

(1) 2 Black. 1142.

(2) Section 99.

(3) Ex parte *King*, 7 East, 92.

(4) Ex parte *King*, 15 Ves. 126.

(5) Ex parte *Farr*, 9 Ves. 513; and see post, 157.

*General jurisdiction.*

Power to expunge a proof.

Commissioners' fees.

By the 60th section of the new statute, the Commissioners are now empowered to expunge, or reduce, the proof of a debt under the commission, — an authority which they did not possess before, and which, in many cases, may be beneficially exercised, with respect to saving the expence of an application to the Lord Chancellor for that purpose, — which last proceeding was always necessary previous to the recent statute.

The Commissioners are entitled to receive the fee of 20s. each for every meeting, and the like sum for every deed of conveyance executed by them, and for the signature of the bankrupt's certificate. (1) Where a commission is executed in the *Country*, every commissioner (who is a barrister) is entitled to a further fee of 20s. for each meeting; and in case he resides at a distance of seven miles or more from the place of meeting, and travels such distance to the meeting, he may receive a further sum of 20s. But no Commissioner is entitled to any allowance for disbursements or travelling expenses (2), nor indeed has the Chancellor any power to make an order for allowing such expenses. (3) And at every meeting under any *Country* commission, so many of those commissioners as are *barristers*, and are willing to attend, not exceeding *three*, are to be the acting Commissioners, and entitled to their summonses and fees, in priority to any of the other commissioners named in the commission. (4) If any Commissioner shall receive a further sum, or shall eat or drink at the charge of the creditors, or of the estate of the bankrupt, or if he shall order any such expense to be made, he is disabled from ever acting again as a Commissioner. (5) The solicitor to the commission is liable to the Commissioners for their fees. (6)

When bound to attend and act;

Those Commissioners who consent to act, are bound to attend a meeting when summoned for that purpose (7), and

(1) Section 22.

(2) *Ex parte Harbin*, 1 Rose, 59.  
*Ex parte Griffiths*, 2 Rose, 542.

(3) *Ex parte Buller*, 1 Mont. 638.

(4) Section 23.

(5) Section 21.; and see *Ex parte Halliday*, 7 Vin. 77., pl. 3.

(6) *Ex parte Griffiths*, 2 Rose, 542.

(7) 1 Mad. 60.

must proceed upon the principle of the commission being valid. (1) They are bound also to act throughout the proceedings in every matter, according to the best of their judgment and discretion; and though the Lord Chancellor will assist them, in case of need, with the weight of his authority, yet he will not encourage their declining to act in any matter, merely for the purpose of having a petition presented to him, to obtain his opinion on the subject. (2) But wherever the legislature has given authority to the Commissioners, without giving them power to punish disobedience to that authority, or to make the authority available for its purpose, the Great Seal will lend the aid of its general jurisdiction, to execute and enforce the provisions of the legislature. (3)

*General jurisdiction.*

when their authority will be assisted by that of the Great Seal.

The Commissioners are, from the nature of their trust, incapacitated from purchasing any of the bankrupt's property, either for themselves or others. (4) And this disability attaches to a Commissioner, who has not even acted under the commission; but if he has obtained the consent of the creditors at a general meeting called for that purpose, it seems, he may then become a purchaser under an order of the Lord Chancellor. (5)

Incapable of purchasing bankrupt's property;

except under an order.

The same person cannot be *solicitor* and *commissioner* under the same commission (6); and if any creditor of the bankrupt acts as a Commissioner (7), the commission will be superseded.

Solicitor, or a creditor, cannot be a commissioner.

An appeal lies from the determination of the Commissioners to the Great Seal by petition (8); and the Lord

Appeal.

(1) 16 Ves. 164.

(2) 15 Ves. 590. It appears from several old cases in the books, that commissioners were formerly in the practice of asking and receiving the opinion of the Court of Common Pleas. 2 Christ. B. L. 9, 10.

(3) Ex parte Woolley, 1 G. & J. 395.

(4) Ex parte Bennett, 10 Ves. 381.

(5) Ex parte Harrison, Buck. 17.

(6) Ex parte Ward, Sel. Ca. Ch. 46.

(7) Ex parte Prosser, 2 Rose, 570. Ex parte Crundwell, 2 Mad. 292. Ex parte Story, Buck. 70. Ex parte Mathews, 1 G. & J. 164.; and see General Order, 25th July, 1817.

(8) Bromley v. Goodere, 1 Atk. 77.

General  
jurisdiction.

Costs.

When  
*functi  
officio.*

Authority  
not deter-  
mined by  
death of  
the king,  
or the  
bankrupt.

Chancellor has power to remove them for misconduct. He will not, however, upon a petition against them, order them to pay costs, unless in respect of conduct out of the course of their duty as Commissioners (1); and when they are made parties to a petition without sufficient grounds, they will then be entitled to costs. (2)

When the Commissioners have once executed an assignment of the bankrupt's estate, and have afterwards given him his certificate, they cannot make a subsequent assignment, for they are then, as to this matter, *functi officio*. (3)

The authority of the Commissioners is not determined, as we have seen, by the death of the King, nor by the death of the bankrupt after adjudication; in the latter case they are expressly empowered to proceed in the commission, as if the bankrupt were still living. (4)

## SECTION II.

### *Of the Power of the Commissioners over the Bankrupt.*

As to the *Examination* of the Bankrupt previous to *Commitment*, see post, Ch. XIII.

Authority  
to compel  
surrender;

As soon as the party is declared a bankrupt, the Commissioners are empowered to call upon him to surrender himself within the time limited by the statute. But if they have reason to apprehend that he is embezzling his effects, or preparing to depart the kingdom, they may summon him to appear before them to be examined (5) immediately. And in case the bankrupt disobeys their summons, (which the Commissioners may now issue at any time, and for any purpose, whether he has obtained his certificate or not,) they may, if he has no lawful impediment made known to and allowed by them, by warrant under their hands and

(1) *Ex parte Scarth*, 14 Ves. 104.  
15 Ves. 295.

(2) *Ex parte Steele*, 16 Ves. 161.

(3) *Jacobson v. Williams*, 1 P.  
Wms. 386.

(4) *Section 26.*

(5) *Ex parte Lingood*, 1 Atk. 240.

seals, authorize any person to arrest him and bring him before them. (1) Upon the appearance of the bankrupt before them, they may examine him upon oath, either by word of mouth, or on interrogatories in writing (2), touching all matters relating to his trade, dealings, or estate; or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, or effects. The Commissioners have in this examination a duty imposed upon them, as well as an authority, to get out an account and discovery for the benefit of the creditors. (3) The bankrupt's answers should be taken down in writing, and he is required to sign them. If the bankrupt refuses to be sworn, or to answer any questions put to him by the Commissioners, or does not fully answer to their satisfaction, or refuses to sign his examination, — they may then by their warrant commit him to prison, without bail, until he shall submit himself to be sworn, and make full answer (4) to their satisfaction to such questions as shall be put to him, and sign his (5) examination. They must, however, in every such commitment for refusing to answer, or not fully answering, any question, specify the question and answer in the warrant of commitment. (6)

*Power over the bankrupt.*

power to examine bankrupt,

and commit him if he refuses to answer, &c.

As the Commissioners have but a special authority, in the commitment of the bankrupt and other persons to

*Liability for illegal commitment.*

(1) *Section 36.* Formerly if the bankrupt disobeyed the summons of the Commissioners, they could not issue their own warrant against him, but were obliged (under the 5 G. 2. c. 30. s. 14.) to certify his disobedience to a judge, or justice of the peace, in order to obtain from them a warrant for his apprehension. (And see *Ex parte Hunt*, 2 J. & W. 560.) And when the bankrupt had passed his last examination, it seems to have been the practice, to apply to the Lord Chancellor for an order on the bankrupt to attend the Commissioners. (*Ex parte Bradley*, 1 Rose,

202. Anon. 14 Ves. 450.) Both these proceedings, however, will now be rendered unnecessary.

(2) *Section 36.*

(3) *Taylor's case*, 8 Ves. 328.

(4) The answer must be full in this sense, — that it must be reasonably satisfactory to the mind that is to decide. (Per Lord Eldon, *Taylor's case*, 8 Ves. 331.)

(5) And see *Rex v. Parrott*, Burr. 1122. *Taylor's case*, 8 Ves. 328. *Ex parte Nowlan*, 11 Ves. 511.

(6) *Section 39.*; and see post, Ch. XIII. "Of the Commitment of the Bankrupt."

Power  
over the  
bankrupt.

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Warrant  
of commit-  
ment.

Bankrupt  
not bound  
to crimi-  
nate him-  
self.

When  
commis-  
sioners  
bound to  
commit.

prison (1), they must be careful not to exceed it; for an action will lie against them in case of an illegal commitment. (2) But to prevent their being perpetually harassed with actions, the legislature has in a great measure protected them, in case of an innocent mistake, by enabling them to tender amends (3), and to pay money into court in any action brought against them, — as well as by giving them double costs (4), in case of a verdict being found for them. As they are not invested, however, with an unlimited authority of committing whom and for what they please, any warrant of commitment which they feel themselves called upon to issue, should pursue the words of the act of parliament, and appear on the face of it to be within the scope of their authority; for the superior courts have been very strict in their construction of the powers thus vested in them by the legislature. (5) They have not power to commit the bankrupt, or any other person, for not answering a question, the answer to which would *directly* criminate himself (6); but otherwise, if it would only TEND to show that he had done something criminal. (7) If the bankrupt, however, refuse to *account for any part of his effects*, on the ground that his answer to the enquiry of the Commissioners would criminate himself, such refusal subjects him to a commitment. (8)

If the Commissioners think that the bankrupt has *not answered satisfactorily* upon his examination, they are bound to commit him; for they are not obliged to give credit to any absurd or improbable account, merely because he has the effrontery to swear to it. (9) Indeed there are no technical rules by which cases of this kind

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|---|---|
| (1) <i>Bracy's case</i> , 1 Salk. 348.  | 5 Mod. 309.; and see post, "Of the Commitment of the Bankrupt." |
| (2) And see post, "Actions."  |   |
| (3) Section 43.   | (6) 5 Mod. 309. Comb. 391.                                      |
| (4) Section 44.   | (7) <i>Ex parte Cossens</i> , Buck. 531.                        |
| (5) <i>Bracy's case</i> , Comb. 391. <i>Rex v. Nathan</i> , 2 Str. 880. <i>Hollingshead's case</i> , 2 Ld. Raym. 851. | (8) <i>Ex parte Officer</i> , 1 Rose, 407.                      |
| 1 Salk. 351. <i>Bracy v. Harris</i> ,   | (9) 6 T. R. 120. <i>Dorwell v. Impey</i> , 1 B. & C. 163.       |

can be determined; but the question in each particular case is, whether the answers given by the bankrupt be sufficient to satisfy the mind of any reasonable person. (1)

*Power over the bankrupt.*  
—

The bankrupt, however, after such commitment may be discharged, upon his answering satisfactorily to the commissioners at a subsequent time — or, upon his answer already given being deemed satisfactory by the superior jurisdiction, before which he may be brought by writ of *habeas corpus*. (2) But though the bankrupt should be afterwards discharged by *habeas corpus*, on the ground of the Court thinking his answers satisfactory, an action of trespass will not lie against the commissioners. (3) For in the exercise of their discretion, under the sanction of an oath, they are *required* to commit, if the answers of the bankrupt be not to THEIR satisfaction.

When bankrupt may be discharged,

without commissioners being liable.

The Commissioners cannot delegate their authority to any other persons to examine the bankrupt, without his consent; for such persons are incompetent to exact any submission from him, upon which the commissioners can commit. (4)

Cannot delegate their authority.

It seems somewhat doubtful whether the Commissioners should be influenced by extrinsic evidence in committing the bankrupt for not answering satisfactorily; but if they are so influenced, the evidence should be fully read over to the bankrupt, before they can call upon him for an answer to the questions proposed to him in his examination. (5)

As to being influenced by extrinsic evidence.

(1) *Ex parte Nowlan*, 6 T. R. 118. 11 Ves. 511. *Taylor's case*, 8 Ves. 328.

(4) *Ex parte Cassidy*, 2 Rose, 219. 19 Ves. 324.

(2) 1 Rose, 407.

(5) *Crowley's case*, Buck. 264. 2 Swanst. 1.

(3) *Dennell v. Impey*, 1 B. & C. 163; and see title "Actions."

## SECTION III.

*Of the Power of the Commissioners to seize the Bankrupt's Property.*

And see further upon this head, "*Messenger*," "*Assignment*," and "*Assignees*."

Power  
over all  
the real  
and per-  
sonal pro-  
perty.

The Commissioners have, by the *twelfth* section of the new act, full power and authority to take such order and direction, as is afterwards particularly specified in the act, with all the bankrupt's lands, tenements, and hereditaments, both within this realm and abroad, as well Copy or Customary-hold, as Freehold, which he had in his own right before he became bankrupt, as also with all such interest therein as he may lawfully depart withal, and with all his Money, Fees, Offices, Annuities, Goods, Chattels, Wares, Merchandize, and Debts, wheresoever the same may be found or known, and to make sale thereof as directed by the act, or otherwise order the same, for satisfaction and payment of the creditors of the bankrupt.

This clause is the foundation of the powers, which the commissioners possess over the bankrupt's property.

Warrant  
of seizure.

As soon as the party is declared a bankrupt, the commissioners are then empowered to issue their warrant (1), under their hands and seals, for the seizure of all the bankrupt's effects, books, papers, or writings, wherever they may be, either in England, Scotland, or Ireland; — and their officer, in order to make such seizure, may break open (2) any house or place where the bankrupt, or any of his property, shall be reputed to be. If any of the effects are suspected to be concealed, a search-warrant (3) from a magistrate may be obtained and executed in the same way, as a search-warrant for stolen property. And when any

(1) Section 27.

(2) The commissioners could not formerly justify the breaking

open any house, except the bankrupt's. (2 Show, 247.); and see post, 169. note (2).

(3) Section 29.



of the property is in Ireland or Scotland (1), the warrant must be first verified in the manner directed by the statute, and indorsed, before it is executed, by a Judge Ordinary, or justice of the peace, in the county where it is intended to be executed. The *property* and the *person* should not both be taken under one warrant, but there ought to be two separate warrants for this purpose.

*Power  
over the  
bankrupt's  
property.*

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#### SECTION IV.

##### *Of the Power of the Commissioners over other Persons than the Bankrupt.*

The authority of the Commissioners is, by the new statute, more complete and extensive than what they formerly possessed, in regard to requiring the attendance of witnesses and other persons, to give evidence upon oath before them of any matter relating to the bankruptcy. (2) They may, now, not only *summon* witnesses to depose, as to the trading and the act of bankruptcy, and call for the production of any books and documents necessary to establish the one or the other,—but they may also, in case of disobedience to the summons, issue a *warrant* to compel (3) their attendance. And the witness will incur the same penalty for refusing to be sworn and examined, for not fully answering, for refusing to sign his examination, or for not producing books or documents, as is provided with respect to persons summoned after adjudication. (4)

*Authority  
to issue a  
warrant.*

(1) Section 28.; and see post, title "Messenger."

(2) Section 24.

(3) This power was first given to the commissioners by the temporary act of the 4 & 5 Ann. c. 17. but it was not again conferred upon them before the 3 G. 4. c. 81.; previous to which last-mentioned act, the commissioners had no power to

compel the attendance of witnesses, to prove the act of bankruptcy and the trading, without obtaining an order of the Lord Chancellor for that purpose. (Ex parte *Lund*, 6 Ves. 781. Ex parte *Higgins*, 11 Ves. 8. Ex parte *Jones*, 1 Rose, 39. &c.)

(4) Section 33.; and see post, p. 154. et seq.

*Power  
over other  
persons.*

*Witness  
alleging  
himself a  
creditor.  
Trustees  
bound to  
produce  
deed.*

*Where no  
excuse for  
non-at-  
tendance.*

*Persons  
suspected  
to have  
bankrupt's  
property,*

*or to be  
indebted  
to bank-  
rupt, &c.*

Although a party summoned as a witness alleges that he is a creditor, and therefore not competent as a witness, it is no preliminary objection to his being examined by the Commissioners, — for the result of the examination may establish, that he is not a creditor. (1) Trustees, also, in a deed of assignment of all the bankrupt's effects, are compellable to produce it before the Commissioners, for the purpose of proving thereby an act of bankruptcy (2); though the petitioning creditor, as we have seen, if he has acted under such a deed, cannot avail himself of it for such purpose. A witness is not justified in refusing to attend the Commissioners to prove the act of bankruptcy, under a *joint* commission against two partners, because he has already attended for the same purpose, under *separate* commissions previously issued against them. And where, in such a case, the petitioning creditor under the *separate* commissions refused to disclose the person who proved the act of bankruptcy under those commissions, the Lord Chancellor inspected the proceedings under the *separate* commissions, and ordered that person to attend the commissioners under the *joint* commission at the peril of costs. (3)

The Commissioners are also empowered, after the party has been adjudged (4) a bankrupt, to summon before them any person suspected of having any of the bankrupt's property in his possession; and their power in this respect is not confined to persons claiming a beneficial interest in such property; for the mere detention of the property, whatever may be the motive, is sufficient to give the Commissioners jurisdiction. (5) They may also summon any one who is supposed to be indebted to the bankrupt, — as well as any person whom they believe capable of giving information (6) concerning any part of the bankrupt's

(1) *In re Geoldie*, 2 Rose, 330.

(2) *Ex parte Cawkwell*, 1 Rose, 513. *Ex parte Treacher*, Buck. 17.

(3) *Ex parte Gardner*, 1 Ves. & B. 74.

(4) *Section 33.*

(5) *Ex parte Anderson*, Buck.

597.

(6) The commissioners could not before enforce the attendance of any persons, except those suspected of having the bankrupt's property.

estate, or any fictitious debt, or any spurious book or document, or other transactions material to the full disclosure of the dealings of the bankrupt; and they may require the production of any books or documents, which may appear to them necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters, which they are authorised to inquire into. And if any person so summoned neglects to come before them, having no lawful impediment, the Commissioners may, by warrant under their hands and seals, direct him to be apprehended and brought before them to be examined. And this may be done after issuing one summons, though it was formerly thought necessary to issue two summonses before the warrant. (1) The propriety of granting the warrant, being an act of discretion, must be determined upon by the Commissioners acting together at the time; but the mere act of signing it may be done by them separately. (2)

*Power over other persons.*

Power to call for books, &c.;

to issue warrant to compel attendance.

They have also power to examine (3) any person upon oath, either by word of mouth, or by interrogatories in writing, concerning the person, trade, dealings, or estate of the bankrupt (4); or concerning any act or acts of bankruptcy by such bankrupt committed, and to reduce into writing the answers of such person, and compel him to sign them. And if any person refuse to be sworn, or to answer any lawful questions put to him by the commissioners, touching any of the said matters — or shall not fully answer to their satisfaction — or shall refuse to sign his examination — not having any objection allowed by the commissioners; or shall not produce any books or documents

Power to examine persons;

and to commit in case of refusal to answer, &c.

or of being indebted to his estate; (Ex parte *Levett*, 1 G. & J. 185.; and see *ex parte Woolley*, *ibid.* 395.) and their jurisdiction in this respect was only supported, by applying to the Lord Chancellor for an attachment against those who made default. 14 Ves. 449.

(1) *Dyer v. Missing*, Bl. 1035.

(2) *Battye v. Gresley*, 8 East, 319.

(3) Section 54.

(4) The bankrupt, whose estate is sought to be charged by an examination before the commissioners, has a right to be present during the examination. (Ex parte *Eardley*, 1 Mont. Dig. 115.)

*Power  
over other  
persons.*  
—

in his custody or power, which he was required to produce, and to the production of which he shall state no objection allowed by the commissioners, — in any of these cases, the commissioners may, by warrant under their hands and seals, commit him to prison without bail, until he shall submit himself to them to do what they had previously required of him. The warrant of commitment should, as in the case of committing the bankrupt, pursue the words of the act of parliament (1); and should also specify all the questions and answers, as far as they are applicable to the commitment. And in case an *habeas corpus* is brought by the person committed, and there shall appear merely an insufficiency in the *form* of the warrant, the Court, or Judge, may re-commit the party until he shall conform, unless it be shown that he has fully answered, or that he had a sufficient reason for refusing to do what was required of him. And the Court, or Judge, may look at the whole of the examination, in order to consider whether the answers of the party were satisfactory or not.

*Incidental  
right of  
examination.*

As the Commissioners are authorised to examine a witness concerning the trading, or the act of bankruptcy, or the estate and effects of the bankrupt, they may incidentally to this power examine him also respecting other individuals, through whom they may be likely to obtain information on those points. Therefore, where a witness was asked questions, as to when and where he last saw the bankrupt's wife, it was held, that such questions were both legal and material, and that the commissioners were justified in committing him for giving unsatisfactory answers to those questions. (2) The true criterion of judging as to the propriety of the commitment, is to consider all the questions and answers collectively — and then to say, whether the *whole* examination is satisfactory or not. Therefore, though *some* of the answers, when taken alone,

(1) *Rex v. Nathan*, 2 Str. 880. (2) *Ex parte Vogel*, 2 B. & A. Salk. 351. 2 Ld. Raym. 851.; and 219.  
see ante, 118.

may be considered satisfactory, — yet this is no objection to a warrant committing the party, till he should make full answers to *all* the questions put to him. (1)

*Power  
over other  
persons.*

The Lord Chancellor will not in general intrude upon the discretion of the Commissioners in the examination of witnesses — although, upon extraordinary occasions, he may limit their examination to a particular mode, or to particular points. Thus, the examination of the mother of the bankrupt was, on petition, ordered to be limited to her son's trading; but Lord Hardwicke refused to restrain the Commissioners, from asking any question that might be relevant thereto. (2) And when a banker, who had been summoned before the Commissioners, instead of attending them, petitioned the Lord Chancellor that the Commissioners might be restrained from asking him certain questions, the petition was dismissed on the opening of the petitioner's counsel — Lord Hardwicke saying, that he would not limit or restrain Commissioners in their examination; for if he did, it would be attended with expense and inconvenience from other applications of this kind; and that he would not presume, that they would ask trifling and immaterial questions. (3)

*As to re-  
straining  
the ex-  
amination  
of the  
commis-  
sioners.*

It was formerly holden, that a person suspected of detaining the bankrupt's effects, and who, before the commission issued, had obtained some goods from the bankrupt in discharge of his own debt, was not bound to answer, whether any of the bankrupt's effects had come to his hands *before* the issuing of the commission; — and that it was sufficient for him to swear generally, that *he had none of the estate of the bankrupt in his hands*. (4) But it has been since ruled, that a witness is bound to give an account of what he knew of the bankrupt's effects, as well before, as after, the bankruptcy; and Lord Erskine said, that Com-

*Party  
bound to  
answer,  
though it  
expose his  
own defec-  
tive title;*

(1) *Ex parte Vogel*, 2 B. & A. 219.

(3) *Ex parte Bland*, 1 Atk. 205.; and see ante, 145.

(2) *Ex parte Parsons*, 1 Atk. 204.

(4) *Jeakil's case*, 3 Keb. 837.

*Power  
over other  
persons.*  
—

but not  
compelled  
to crimi-  
nate him-  
self;

or to de-  
stroy his  
own pro-  
ceedings.

To what  
bankrupt's  
wife may  
be examin-  
ed.

missioners, of their own authority, may examine parties, and make them confess the infirmity of their title. (1) Notwithstanding, however, a person suspected of having the bankrupt's property in his possession is bound to answer questions, though the answer may expose his own defective title, he is not (any more than the bankrupt) compelled to do so, if the answer would *directly criminate himself* (2); though he is not excused, if the answer would only *TEND* to shew, that he had done something criminal. (3) If a witness, however, do unguardedly answer questions to which he might have demurred, his answers may be adduced in evidence against him, for all purposes to which they are legally applicable. (4) And the Commissioners will not be restrained from examining parties, upon a mere allegation, that the object of the examination is to procure evidence against them, as to penalties incurred by gaming. (5) But the Commissioners under a joint commission cannot compel the petitioning creditor to a prior *separate* commission to attend them, in order to give evidence in support of the subsequent *joint* commission against the same party and his co-partner; for this would be compelling him to be a witness to destroy his own proceedings. (6)

The Commissioners are also empowered to summon before them the *wife* (7) of the bankrupt, and examine her for the purpose of discovering such part of the bankrupt's estate and effects, as may be concealed, kept, or disposed of, either by herself or by any other person; and she will incur the same penalty for refusing to be sworn and examined, or for other disobedience to the authority of the Commissioners, as other persons are liable to in this respect. But, though the wife may be examined by the Commissioners, as to the bankrupt's

(1) Ex parte *Herbert*, 13 Ves. 189.

(2) 5 Mod. 509. Comb. 391.

(3) Ex parte *Cossens*, Buck. 551.

(4) *Smith v. Beadnell*, 1 Camp. 30.

(5) Ex parte *Burlton*, 1 G. & J. 30.

(6) Ex parte *Stones*, 1 G. & J. 7.

(7) Section 37.

property, they have no power to examine her on any matter relating to the act of bankruptcy; for, by the common law, a wife cannot be a witness either for or against her husband; and this special authority given to the Commissioners, which breaks in upon that rule of law, is not to be extended beyond what the statute gives them. (1) It has been also considered questionable, whether the bankrupt's wife is admissible to prove payments in contemplation of bankruptcy. (2)

*Power  
over other  
persons.*  
———

The Commissioners may likewise examine upon oath, either by word of mouth, or by interrogatories in writing, every person claiming to prove a debt (3) under the commission, and may require such further proof, and examine such other persons in relation thereto, as they shall think fit. And it seems, that the power of the Commissioners in the examination of a creditor of the bankrupt, in respect of a debt which he seeks to prove, is not different from that which they may exercise, in the examination of other persons concerning the bankrupt's property; and that they may compel him to produce books relating to his transactions with the bankrupt, in the same way as they can enforce the production of books from other persons — or, if they choose, by the more indirect method of refusing otherwise to receive the proof of his debt. (4)

*Creditors.*

The Commissioners may also at all times summon the assignees (5) before them, and require them to produce all books, &c. relating to the bankruptcy, — and, in default of their attendance, may issue their warrant to enforce it; and they have the like power of commitment with respect to them, as with respect to other persons.

*Assignees.*

As the Commissioners cannot issue *subpœnas*, they must, upon any collateral questions, or other matters coming before

(1) *Ex parte James*, 1 P. Wms. 611.

(4) *Ex parte Woolley*, 1 G. & J. 398.

(2) 1 Esp. 67.

(5) Section 101.

(3) Section 45.

*Power  
over other  
persons.*

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them, for inquiring into which they are not empowered to issue their summons, proceed by affidavit. (1)

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### SECTION V.

#### *Of the Protection and Indemnity of Witnesses, and other Persons, attending the Commissioners.*

*Witnesses  
privileged  
from ar-  
rest;*

Witnesses summoned to attend Commissioners of Bankrupt have the same privilege, as those attending Courts of Justice, namely, the exemption from arrest *eundo, redeundo, et morando*. (2) And it is not material, whether the witness be summoned in writing, or verbally, by the messenger (3), — provided the Commissioners afterwards adopt the verbal summons. The privilege also extends to persons who attend voluntarily, on a mere application to them for that purpose (4); or who, on their own importunity, are summoned by the Commissioners (5); as well also as to one who attends, even without any application, and requests to be examined as a witness, — provided the Commissioners signify their intention to do so; but it is a question whether, in this last case, such person would be entitled to protection *eundo*. (6)

*so a cre-  
ditor at-  
tending to  
prove.*

A creditor, also, who attends to prove his debt, has the same privilege, as a witness who is summoned before the Commissioners; for he is as much entitled to protection, as any party attending the prosecution of his suit in a Court of Justice. (7)

*Where  
arrest  
amounts  
to a con-  
tempt.*

If the arrest of the witness, or the party attending, amounts to a *contempt*, the application for his discharge is made to the Lord Chancellor upon *motion* (8); the order

(1) *Ex parte Thistlewood*, 19 Ves. 250.

(2) *Ex parte Stow*, 2 Bl. 1142.

(3) *Arding v. Flower*, 8 T. R. 554.

(4) *Ibid. Ex parte King*.

(5) *Ex parte Kerney*, 1 Atk. 54.

(6) *Ex parte Bayne*, 1 Rose, 451. 1 V. & B. 316.

(7) *Ex parte List*, 2 Rose, 24. *Ex parte King*, 7 Ves. 316. *Ex parte Bryant*, 1 Mad. 49.

(8) *Anon.* 1 Rose, 230. The Court of *King's Bench* have re



upon which is entitled in the bankruptcy (1); and the Lord Chancellor administers the oath by the register, and examines the party himself. (2) The party arrested may also proceed by process against the officer and solicitor for the contempt. (3) If the arrest does not amount to a contempt, then the proper course is to apply by petition; and the Chancellor, upon an affidavit of the facts, will order him to be discharged. And in case of a detainer being lodged after the arrest, that will also be set aside, if the original arrest is bad. But in both cases, the arresting and the detaining parties will have an opportunity of being heard against the petition, or the motion for the discharge. (4) With respect to the costs of an application to be discharged from such an arrest, they will be ordered to be paid by the officer or person causing the arrest, — but will at the same time in general depend upon, whether a contempt was intended, or not, by the party arresting; they have been ordered, where the witness was arrested by the bankrupt. (5) Where the crown is the arresting creditor, the order for discharge must be upon the gaoler. (6) If the application for the discharge only affects the creditor arresting, the party may be forthwith discharged; but where there are other detainers, the Court must hear the persons by whom they are lodged, for the purpose of ascertaining, whether they are founded upon the original arrest. (7) Every witness summoned to attend before the commissioners, must have his necessary expenses (8) tendered to him, in like manner as is required, upon service of a sub-

*Protection of witnesses.*

Where it does not.

As to the costs of application for discharge.

Where several detainers.

Tender of witness's expenses.

used to grant such an application, on the ground, that that Court was not the Court of which the contempt was committed. *Kinder v. Williams*, 4 T. R. 377.

(1) 11 Ves. 556. 16 Ves. 413.

(2) 16 Ves. 413. *Aylett's case*, *cit. ibid.* *Gascoigne's case*, 14 Ves. 163.

(3) *Ex parte Kerney*, 1 Atk. 54. *Ex parte King*, 7 Ves. 315.

(4) *Ex parte King*, 7 Ves. 315. *Ex parte Donlevy*, *Ibid.* 318. *Ex parte Byne*, 1 V. & B. 316. *Ex parte Ross*, 1 Rose, 360. *Ogle's case*, 11 Ves. 258. *Castle's case*, 16 Ves. 413.

(5) *Ex parte Byne*, *supra*.

(6) *Ex parte Russell*, 1 Rose, 278.

(7) *Ex parte King*, 7 Ves. 312.

(8) Section 35.

*Protection  
of wit-  
nesses.*

When  
tender un-  
necessary.

poena to a witness in an action at law. It is not necessary, however, upon summoning a person suspected to have any of the bankrupt's property (as it is in summoning a witness) to tender him the expenses of his journey before hand, even though the commissioners may have made an order, in the first instance, for the payment of his expenses, — and the assignees have in fact offered to pay such expenses as the commissioners shall think reasonable (1); but he may afterwards, when his examination is concluded, be allowed such charges as the commissioners shall think fit. (2) If he is indeed without the means of taking the journey, that may be an excuse for not obeying the summons, but will not invalidate the warrant of the commissioners to bring him before them; and the *onus* lies on the person summoned, in all cases where he brings an action against the commissioners, to prove that he was prevented by a lawful impediment from attending them. (3) After a party has been examined, he may maintain assumpsit for any costs directed by the commissioners to be paid to him, although such order is merely by parol. (4)

As to right  
of party  
examined  
to have  
counsel.

A person, who is summoned before the commissioners to be examined by them, is not entitled to the assistance of counsel, as a matter of right, but merely as a matter of indulgence on their part; and Lord Hardwicke, upon one occasion, refused to make an order upon commissioners to permit a person so summoned to have counsel, — though he recommended them, in that particular instance, to permit it. (5) This indulgence, however, has in the present day become quite a matter of common practice, and there is no instance of its being refused. (6)

If a witness is prevented by any lawful impediment from attending the commissioners according to their summons, he ought, for his own protection, to make it known to

(1) *Ex parte Roscoe*, 2 Rose, 345.

(2) *Section 35.*; and see *Ex parte Benson*, 2 Rose, 75. *Ex parte Roscoe*, *supra*.

(3) *Ibid.*; and see *Battye v. Gresley*, 18 East, 319.

(4) *Yarker v. Botham*, 1 Esp. 64.

(5) *Ex parte Parsons*, 1 Atk. 204.

(6) *Eden's B. L.* 82.

them, and obtain their allowance for the excuse; otherwise a warrant will issue against him as a matter of course.

## SECTION VI.

### *Of the Depositions.*

The Depositions and Proceedings taken before the Commissioners are not of a public nature, but taken principally to defend themselves; no one, therefore, is entitled to a copy of them (1); and the Court of King's Bench refused the application of a party, for a copy even of his *own* deposition. (2) It is, however, in the discretion of the Lord Chancellor to permit, or refuse, any party to have a copy of his examination before the commissioners. (3) But where a bill was brought by assignees for a discovery of the bankrupt's effects, the Lord Chancellor would not allow the defendants to look into their own depositions before the commissioners, in order to make their answers consistent (4); — Lord Hardwicke observing — that as truth is always uppermost, they might put in an answer consistent with what they had already sworn in their depositions, supposing them to be true; — and if false, they swore at their own peril.

A party not entitled to a copy of his deposition;

but Lord Chancellor may permit a copy to be taken.

When refused.

But though the Depositions and Memorandums of the commissioners' proceedings are taken in some measure for their own protection, yet as the object of all the proceedings under the commission is for the benefit of the bankrupt's creditors, the assignees (who represent the creditors) and not the commissioners, are entitled to the custody of them. (5) They are usually kept by the solicitor nominated by the assignees; and when the production of them becomes material for the purposes of justice, neither the so-

Custody of the proceedings.

(1) *Ex parte Watson*, 1 C. B. L. 106.

(2) *Bracy's case*, 1 Ld. Raym. 153.

(3) *Ex parte Chater*, Buck. 290.

(4) *Boden v. Dellow*, 1 Atk. 288.

(5) *Ex parte Scarth*, 15 Ves. 293.

**Depositions.**

What considered as part of the proceedings.

No lien on them.

licitor, nor the assignees, will be permitted to say that they are in any person's hands but their own. (1) Depositions, also, upon which the commissioners have founded a report to the Lord Chancellor upon a reference to them, are proceedings under the bankruptcy, and as such are to be left in the custody of the assignees; but the report must be filed in the Bankrupt office. (2) And any books or documents, referred to by the bankrupt on his last examination, form likewise part of the proceedings under the commission. (3) But neither the solicitor to the commission, nor any officer of the court, has a lien on the proceedings for their costs or fees in any matter relating to them (4); and costs will always be given against that person who, by refusing to deliver them up to the assignees, drives them to an application to the Lord Chancellor to obtain them. (5)

## SECTION VII.

### *Of Actions, and other Proceedings, against the Commissioners.*

The Court may look at the whole of the examination.

The new statute has introduced several fresh regulations with respect to actions against Commissioners, affording them, very properly, the same protection as that possessed by justices of peace. Thus by *Section 40*, in the event of any action being brought against the commissioners by the bankrupt, or other person, for being committed by them for refusing to be examined, or not fully answering to questions, the Court or Judge upon the trial (if required by the defendant) may, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of such examination; and if it shall then appear to

(1) Per Lord Eldon. *Ex parte Bullen*, 1 Rose, 135.

(2) *Ex parte Newton*, 2 Rose, 19.

(3) *Ex parte Hardy*, 1 Rose, 396.

(4) *Ibid.* 395. *Ex parte Bullen*. *Ibid.* 134. *Ex parte Sandison*, *Ibid.* 275.

(5) *Ex parte Hardy*, 1 Rose, 396.

the Court or Judge, that the party was lawfully committed, the defendant will have the same benefit therefrom, as if the whole of the examination had been stated. **Actions.**

No action can be commenced against any Commissioner for any thing done by him as such, unless notice in writing (1) of the intended writ or process shall have been delivered or left at his usual place of abode, by the attorney for the party intending to sue out the same, at least one calendar month previously; the notice, too, must set forth the cause of action, and must be indorsed with the name and place of abode of the attorney, who is to receive no more than 20s. for preparing and serving it. In default of proof of such a notice, the commissioners will be entitled to a verdict, and costs against the party bringing the action; and no evidence can be given by the plaintiff, on the trial, of any other cause of action than what is contained in the notice. (2) **Notice of action.**

Every Commissioner may also, within one calendar month after such notice, tender (3) amends to the party complaining, or to his agent or attorney; and if not accepted, may plead the same in bar to any such action, together with the plea of not guilty, and any other plea, with leave of the Court; and if the jury shall find the amends so tendered to have been sufficient, they are to give a verdict for the defendant. If the plaintiff shall become nonsuit, or discontinue his action, or if judgment shall be given for the defendant upon demurrer, the commissioner will be entitled to the like costs, as he would have been entitled to in case he had pleaded the general issue only. But if the jury shall find that no amends, or not sufficient, were tendered, and also against the defendant on the other plea or pleas, the plaintiff will then be entitled to a verdict for damages and costs. And though the commissioner neglects to tender amends, or tenders insufficient, previous to the action, — he may, nevertheless, by leave of the Court, **May tender amends.** **If plaintiff becomes nonsuit.** **may pay money into Court.**

(1) Section 41.

(3) Section 45.

(2) Section 42.

**Actions.**

at any time before issue joined, pay into Court such sum as he shall think fit; upon which such proceedings shall be had, as in other actions where the defendant is allowed to pay money into Court.

**Limitation of actions.**

Every action against any person, for any thing done in pursuance of the act, must be commenced within three calendar months (1) next after the fact committed; and the

**May plead general issue.**

defendant may plead the general issue, and give the statute and the special matter in evidence at the trial, and that the same was done by authority of the statute; and if it shall appear to have been so done, or that the action was commenced after the time limited for bringing it, the de-

**Defendant entitled to double costs.**

fendant will be entitled to a verdict; and in that case, or in case of a nonsuit, or discontinuance of the action after appearance, or if upon demurrer judgment shall be given against the plaintiff, the defendant will be entitled to double costs.

**When commissioners liable to action.**

The right of action against the Commissioners is founded upon the general rule of law, applicable to all actions of trespass against persons having a limited authority. If they do any act beyond that limit, they thereby subject themselves to an action of trespass; but if the act done be *within* the scope of their authority, although it be done through an erroneous or mistaken judgment, they are then not liable (2) to such action. Thus, though it was formerly held that an action would lie against them, for committing a person for not answering improper questions, or not acquiescing in a proper answer (3), — it has been since decided, that commissioners are not liable to an action of trespass for committing a bankrupt, who does not answer to their satisfaction, notwithstanding he is discharged afterwards by *habeas corpus* on the ground of the Court thinking the answers (4) satisfactory; for the commissioners have a discretionary power to commit, if the answers are not

(1) Section 44.

(3) *Miller v. Seare*, 2 Bl. 1141.

(2) Per Abbott C. J. *Doswell v. Impey*, 1 B. & C. 169., and see ante, 150. and seq.

(4) *Doswell v. Impey*, 1 B. & C.

satisfactory to *themselves*. Neither will any action lie Actions.  
against commissioners for a commitment, which is bad only  
in consequence of a formal defect in the warrant. (1)

In an action brought against the Commissioners by a Where  
onus of  
proof lies  
on plain-  
tiff.  
person apprehended on their warrant, for not obeying a  
previous summons requiring his attendance before them,  
it lies on the party summoned, having a lawful excuse for  
not attending, to prove the fact of his being prevented  
from attending by a lawful impediment. (2)

When the Commissioners have incurred any costs, by Right to  
indemnity  
from costs.  
defending an action brought against them for an act done  
in the strict discharge of their duty, they have a right  
to be compensated by the assignees; and the Chancellor  
will not restrain them from bringing an action to recover  
such costs, though the assignees have not received sufficient  
to pay the expenses of the commission, and have, in fact,  
no prospect of obtaining any more of the bankrupt's pro-  
perty. The Commissioners, indeed, act under a double  
security; for, besides that which every other judge is en-  
titled to in the exercise of his duty, they have also the  
covenant of the assignees. (3)

Where the bankrupt is confined in prison under pre- How far  
warrant  
evidence  
of the  
imprison-  
ment.  
vious process, the mere issuing of the commissioners' war-  
rant does not amount to an imprisonment by them, until it  
has been in some way operative to the detention of the  
party, independently of the other process; for the warrant  
is only evidence of the *order* for imprisonment, and not of  
the imprisonment itself. But if it operate to the confine-  
ment of the party within narrower bounds, it is then,  
coupled with proof of that fact, evidence of an imprison-  
ment by the commissioners. (4)

Where the bankrupt had been already nonsuited in an Court will  
stay pro-  
ceedings  
action against the Commissioners in the King's Bench,

(1) *Bracy's case*, Comb. 391A(3) *Ex parte Linthwaite*, 16 Ves.(2) *Battye v. Gresley*, 8 East, 234.  
319.(4) *Crowley v. Impey*, 2 St:  
261.

***Actions.***

till costs of  
a former  
action  
paid.

on the ground that he was not prepared with evidence to prove the validity of a former commission, the Court of Common Pleas, in an action for the same cause, stayed the proceedings until the plaintiff paid the costs of the former action. (1)

When  
commis-  
sioners  
may make  
affidavits  
in answer  
to any pe-  
tition.

Notwithstanding a petition from the bankrupt, or any other person, reflects on the conduct of the commissioners, they are not called upon, and indeed ought not, to make affidavits in answer to the allegations contained in it, unless they are actually served with the petition. In that case they are made *parties*, and may properly come forward, and defend their conduct upon affidavit; but they are not otherwise to make themselves a species of witnesses, either with respect to their own conduct, or the general nature of the transactions under the commission. They are to take it for granted, that the Lord Chancellor will give them credit for having acted properly, unless such a case appears upon the petition, as induces him to call upon them for an explanation of their conduct, — in which case, if the imputations against them prove to be groundless, they will then have justice done them with respect to their costs and expenses. But this cannot be done, where they come forward as *parties*, without being served with the petition. (2)

(1) *Crowley v. Impey*, 8 Taunt. 108.; and see *Ex parte Steele*, 407. 2 Moore, 460. 16 Ves. 161. *Ex parte Scarth*,  
(2) *Ex parte Husband*, 1 G. & J. 14 Ves. 104. 15 Ves. 293.



## CHAP. VIII.

## OF THE MESSENGER.

**THE Messenger is the officer of the Commissioners, and his duty is to execute promptly the summonses and warrants directed to him by them, whether for the seizure of the bankrupt's property, or for summoning or apprehending the bankrupt, or other persons, during the different proceedings under the commission. For his trouble in the discharge of these duties, he is entitled to certain fees, which are taxed by the commissioners, and are paid out of the bankrupt's estate. There are several messengers attached generally to the commissioners of bankrupts in London; and it is usual for the solicitor, who issues a town commission, to nominate which of them he chooses to act as messenger under it.**

Nature of the office.

**The messenger is amply protected in the discharge of his duty, if he behaves himself properly, and does not exceed the limits of his authority, as defined in the various enactments of the statute. He may, by warrant under the hands and seals of the commissioners, "break open (1) any house, chamber, shop, warehouse, door, trunk, or chest of any bankrupt (2), where the bankrupt or any of his property shall be reputed to be, and seize upon the body, or property, of the bankrupt." And if the bankrupt be in prison or in custody, he may seize *any property* (3) (except**

His authority as to the seizure of the bankrupt's person and property.

(1) Section 27.

(2) The wording of this section is rather obscure; for it seems doubtful whether the words, "of any bankrupt," are intended to apply only to "trunk or chest," (as from the pointing of the printed act would seem to be implied), or are meant to be connected with the matters previously enumerated, namely, "any house, chamber,

&c.,"—under which last construction, the messenger would not be justified in breaking open any house, &c., except the house of the bankrupt. And this, indeed, was formerly the law. 2 Show. 247.

(3) There is also an omission in this part of the clause, in not confining the seizure to the property of the bankrupt; but this of course must necessarily be inferred.

his necessary wearing apparel) in the custody or possession of the bankrupt, or of any other person, in any prison or place where the bankrupt is in custody.

Where  
part of the  
property is  
in Ireland.

If any of the bankrupt's property (1) is in *Ireland*, the messenger may in the same way seize the property there; but the warrant in that case must be verified upon oath by the solicitor under the commission, before the mayor or other chief magistrate of the city or town where or near to which the commission is executed, and be also verified under the common seal, or the seal of office of such mayor or magistrate; and the messenger must also depose upon oath, before a justice of peace residing in the county where the bankrupt's property shall be reputed to be, that he is the person named in such warrant.

Where  
the pro-  
perty is  
concealed.

Where there is reason to suspect that property of the bankrupt is concealed (2), the messenger may then obtain a search-warrant from any justice of peace in England, or Ireland, and may execute it in the same manner, and is entitled to the same protection, as is allowed by law in the execution of a search-warrant for stolen property.

Where  
any pro-  
perty is in  
Scotland.

If, in the execution of the commissioner's warrant, it becomes necessary to have access to any house or place of the bankrupt in *Scotland* (3), the warrant, after being verified upon oath as before mentioned, must be backed or indorsed with the name of a judge ordinary or justice of the peace in Scotland, which will be then sufficient authority to the messenger, and all officers of the law in Scotland, to execute it within the county or burgh wherein it is so indorsed.

Inventory  
of bank-  
rupt's ef-  
fects.

The messenger, when he seizes the bankrupt's property, should make an inventory of every article, which the bankrupt ought, if possible, to see and acknowledge to be correct; and the inventory, with the articles contained in it, must as soon as assignees are chosen be delivered up to them. None of the property should be left in the bank-

(1) *Section 28.*

(2) *Section 29.*

(3) *Section 30.*

rupt's power,— and care should be taken that no document is lost. The usual way of securing the books and papers is to put them into a box, or some other safe place of deposit, sealing it up with the messenger's seal, as well as with that of the bankrupt, and thus to keep them until assignees are chosen.

When the messenger has once taken possession of the bankrupt's property, he should not quit possession upon the representation of any person claiming the property as his own; for if he quits possession, there may be some difficulty in his resuming it; as it is a question, whether, after having once abandoned it, the warrant of the commissioners is not spent. (1) Perhaps the safest mode of proceeding, in such a case, would be to get a fresh warrant from the commissioners; since an attachment will not be granted, under these circumstances, against a person for refusing to permit the messenger to take a (2) *second* possession.

After seizure, messenger should not quit possession.

As the messenger was formerly put to much expense and trouble, from actions being brought against him, for the mere purpose of trying the validity of the commission, a protection is now given to him, similar to that, which the law affords to constables in the execution of their duty. He seizes the property of the bankrupt, indeed, at his own hazard; but no action can be brought against him for any thing done in obedience to the commissioners' warrant prior to the choice of assignees, unless a previous demand (3) in writing is made by the party, or his attorney, of the perusal and copy of the warrant, nor unless the same hath been refused or neglected for six days after being made. And if, after compliance with such demand, any action be brought against the messenger, without making the petitioning creditor a defendant also, the jury, on proof of such warrant at the trial, must give their verdict for the

Indemnity as to actions.

As to demand and refusal of the warrant.

Petitioning creditor must be joined in the action.

(1) Per Lord Eldon, *Ex parte Page*, 1 Rose, 2.

(2) Per Lord Eldon, *Ex parte Page*, 1 Rose, 2., and 17 Ves. 59.

(3) Section 31.

defendant, notwithstanding any defect of jurisdiction in the commissioners. But, if the action be brought against the petitioning creditor as well as the messenger, the jury, on proof of the warrant, are equally bound to give their verdict for the messenger; and if a verdict be given against the petitioning creditor, the plaintiff may recover his costs against him, so as to include the costs which such plaintiff is liable to pay to the messenger. And proof in such an action, that a defendant is the petitioning creditor, renders him (1) liable to the same extent, as if the act complained of in the action had been committed by the defendant. As this protection, however, of the messenger is only given to him, for acts done *prior* to the choice of assignees, he should in all doubtful cases, when the action is brought *after* the choice, secure himself by taking an indemnity from the assignees.

Limitation  
of action,  
and dou-  
ble costs.

The messenger is also within the section (2) of the statute, which provides for the limitation of actions against any person, for any thing done in pursuance of the act, and for double costs in case the defendant succeeds in the action.

Obstruc-  
tion of the  
messenger  
a con-  
tempt.

Besides the above protection afforded to the messenger by the statute, any obstruction that he may meet with, in the execution of the warrant of the commissioners, is considered a contempt of the Great Seal; and the persons so obstructing him will be liable to an attachment as for a contempt, notwithstanding the messenger may have acted under the immediate authority given by the statute, and not under any previous order of the Court. (3) Any person, also, who indemnifies another against the consequences of turning a messenger out of possession of property seized by him, is equally guilty of a contempt (4); and it is no justification for resisting him, that the warrant was illegal. (5) In one case, where the captain of a ship

Where  
captain of

(1) Section 32.

(2) Section 44. ante, 132.

(3) *Ex parte Page*, 1 Rose, 1. *Page*, ante.  
*Ex parte Titner*, 1 Atk. 136. *Ex parte Dixon*, 8 Ves. 104.

(4) *Ex parte Dixon*, 8 Ves. 104.

(5) *Ex parte Titner*. *Ex parte*

turned the messenger out of possession of the bankrupt's goods, which were laden on board, and formed part of the ship's cargo, the Lord Chancellor ordered, that he should give security for answering to the assignees, what interest they could prove the bankrupt had in the cargo, at the time the messenger took possession of it. (1) And, generally, if the captain of a ship refuses to deliver up the bankrupt's goods to the messenger, the Lord Chancellor will make an order for the goods to be delivered, upon payment of freight, and indemnifying the captain against the rights of other persons. (2) But where goods have been seized by a messenger as the property of the bankrupt, the Lord Chancellor has in one case refused to order them to be delivered up to a petitioner merely claiming them as his own, the proper remedy being an action at law against the messenger. (3)

a ship re-  
fuses to  
deliver  
goods.

A provisional assignment is often made of the bankrupt's estate to the messenger, in order to protect it against the process of the crown, and he is afterwards bound to execute a re-assignment of it to the assignees chosen by the creditors. When the messenger died between the execution of the provisional assignment, and the choice of assignees, his infant heir was held to be a trustee of the real estate of the bankrupt, within the statute of Anne. (4)

Provisi-  
onal as-  
signment.

The petitioning creditor is in the first instance personally answerable to the messenger for his charges before the party be declared a bankrupt (5), as well as for all his costs before the choice of assignees; but this liability is only for necessary charges and expenses. Therefore, where a messenger took an unnecessary and fruitless journey to the Isle of Man, without any authority from the petitioning creditor, it was held that he had no claim in this respect against the petitioning creditor. (6) After assignees are chosen, they are then

Costs.

Petition-  
ing cre-  
ditor when  
liable.

Assignees.

(1) Ex parte *Dixon*, 8 Ves. 104.

(4) Ex parte *Carter*, 5 Mad. 81.

(2) *Molloy*, 253. Eq. Ca. Ab.  
98.

(5) *Burwood v. Kant*, 2 Carring.  
& P. 123.

(3) Ex parte *Craggs*, 1 Rose, 35.,  
but see ante, page 16.

(6) *Billings v. Waters*, 1 Star.  
363.

Mode of  
recovering  
costs.

Solicitor  
not per-  
sonally  
liable to  
messenger,  
without a  
special  
agree-  
ment.

liable to him for all his subsequent costs, — notwithstanding even the commission is superseded, and they have not attended any meeting of the commissioners, or received any effects under the commission. (1) The assignees are also presumed to know, that the messenger has a claim for the payment of his bill out of the bankrupt's effects, and ought therefore to reserve sufficient funds to satisfy it; and it is no objection to his claim against them, that he has neglected to make his demand until after a final dividend. (2) The messenger is not obliged to bring an action for the recovery of his fees, but is entitled to proceed, by the more summary remedy of a petition to the Lord Chancellor. (3)

Though the solicitor to the commission in general nominates the messenger, and is the medium through which it is convenient that the latter should receive his bill of fees, yet this will not make the solicitor personally liable to the messenger. (4) But if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, *he* will then be personally liable to the messenger, as for money had and received (5), — though the petitioning creditor, in such a case, will not be exonerated from his liability to the messenger, without the express consent of the messenger to discharge him. (6)

(1) Ibid. *Ex parte Hartop*,  
9 Ves. 109.

(2) *Ex parte Hartop*, 1 Rose,  
449.

(5) 9 Ves. 109. 1 Rose, 450.

(4) *Hartop v. Juckes*, 2 M. & S.  
438. *Hart v. White*, 1 Holt, 576.

(5) *Hartop v. Juckes*, *supra*;  
and see *Ex parte Hartop*, 12 Ves.  
349.

(6) *Hart v. White*, 1 Holt, 576.

## CHAP. IX.

## OF THE PROOF OF DEBTS.

1. *Of Debts in general, and herein of the Rights and Duties generally of Creditors.*
2. *Of the Creditor's Election.*
3. *Time of Proof.*
4. *Manner of Proof.*
5. *Of Judgment Creditors.*
6. *Of Creditors having a Mortgage or Equitable Lien.*
7. *Debts payable in futuro.*
8. *Contingent Debts.*
9. *Creditors by Marriage Articles.*
10. *Creditors of a Bankrupt Executor or Trustee, and herein of the Executors of a Creditor.*
11. *Creditors by Annuities.*
12. *Servants, Apprentices, and Children.*
13. *Awards.*
14. *Bonds.*
15. *Bills of Exchange and Promissory Notes, and herein of Cross Paper Demands.*
16. *Of Policies of Insurance.*
17. *Rent.*
18. *Interest.*
19. *Costs.*
20. *Damages.*
21. *Sureties.*
22. *Creditors by Composition.*
23. *Friendly Society Act.*
24. *Rates and Taxes.*
25. *Debts illegal and void.*
26. *Of claiming a Debt.*
27. *Of expunging a Proof.*

(For the proof of *Joint Debts*, and proof between *Partners*, see post, Chap. XVI.)

## SECTION I.

*Of Debts in general, and herein of the Rights and Duties generally of Creditors.*

Creditor  
may prove,  
notwith-  
standing a  
prior act  
of bank-  
ruptcy.

**T**HERE are some general rules applicable to all cases of the proof of debts under the commission, which should be considered previously to admitting any creditor to prove. The first consideration is, when the debt accrued, or was contracted. Before the statute 46 G. 3. c. 135. s. 2. the law was, that the debt must have *accrued before the act of bankruptcy*, in order to enable the creditor to prove it (1); a rule, which was often attended with inconvenience, and not unfrequently productive of injustice. But by a provision of that statute, which is incorporated in the 47th section of the new act, every person with whom any bankrupt shall have really and *bond fide* contracted any debt or demand before the issuing of the commission, may, notwithstanding any prior act of bankruptcy committed by the bankrupt, be admitted to prove the same, provided he had not, at the time it was contracted, *notice* of such act of bankruptcy. The act of bankruptcy, meant in this section, is the act of bankruptcy *on which the commission* (2) *is issued*; for the object of the clause, like the former act of the 46 G. 3., is to facilitate and give a greater capacity of proving debts, and is in relief both of the creditor and the bankrupt. Therefore if the debt is contracted before the act of bankruptcy on which the commission is issued, though after notice of a prior act of bankruptcy, it may nevertheless be proved under the commission. (3)

(1) *Bamford v. Burrell*, 2 B. & P. 1. *O'Brien v. Grierson*, 2 Ball & B. 334.

(2) *Ex parte Bowness*, 2 M. & S. 479.

(3) *Ibid.*



It is also no objection to the proof of a debt, (except in the case of the petitioning creditor) that it was contracted with the bankrupt after he left off trade. (1) But a debt which is barred by the *statute of limitations* cannot be proved, although the bankrupt admit that he contracted the debt and never paid it. (2) A debt, contracted by the bankrupt's wife before her coverture, may likewise be proved under the commission against him; for when a woman marries, all her debts become, by the marriage, the debts of her husband. (3)

*Debts and creditors.*

As to time of contracting debt.

Whenever a debt is barred by the certificate, it is (with only one or two exceptions, which will be noticed in a subsequent chapter (4),) provable under the commission; and the converse of this proposition likewise holds true. (5) But before a debt can be proved, it must either be actually liquidated and ascertained, or capable of being so (6); and it must also be contracted for a lawful consideration. (7)

What debts provable.

Proof of a debt has been decided by the Vice-Chancellor to be equivalent to payment. (8) But this position appears to have been doubted by Lord Eldon. (9) Proof of a debt, however, is so far binding on the creditor, that if he has a security or lien on any property of the bankrupt, and proves for the whole debt, he will not be allowed afterwards to withdraw his proof, and avail himself of his security or lien, — but must deliver up the security, or property on which he has a lien, for the general benefit of the creditors. (10)

How proof operates.

(1) *Maggett v. Mills*, 12 Mod. 159. 1 Ld. Raym. 287.

(2) Ex parte *Deodney*, 15 Ves. 479. Ex parte *Seaman*, Ibid. Ex parte *Raffey*, 2 Rose, 245.

(3) *Miles v. Williams*, 1 P. Wms. 349.

(4) Vide post. "Of the Effect of the Certificate."

(5) 1 Atk. 119. *Barnford v. Barnard*, 2 B. & V. 11.

(6) *Goddard v. Vanderheyden*,

3 Wils. 262. *Utterson v. Vernon*, 3 T. R. 546.

(7) See post, Sect. 25. "Of Illegal and Void Debts."

(8) Ex parte *Watson*, Buck. 456. Ex parte *Smith*, Ibid. 492. Ex parte *Hornby*, Ibid. 351.

(9) Ex parte *Hunter*, Buck. 556.

(10) Ex parte *Downes*, 18 Ves. 290. 1 Rose, 96. Ex parte *Solomon*, 1 G. & J. 25.

**Debts and creditors.**

Penalty on a creditor receiving more from the bankrupt, than the other creditors.

Creditors must come in upon equal terms,

notwithstanding they have securities.

Exceptions.

Mode of proof as to creditors holding securities.

Joint securities.

By *Section 8.* of the new statute, if any creditor, after a docket struck against a bankrupt, receives from him any money, gift, satisfaction, or security for his debt, or any part of it, whereby the creditor may receive more in the pound in respect of his debt than the other creditors, he thereby forfeits his whole debt, and is also compellable to deliver up such money, &c. or the full value thereof, to such person as the commissioners shall appoint.

The aim of the legislature, therefore, being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every description must come in upon equal terms; nor will the nature of their demands make any difference, unless they have obtained actual execution against the bankrupt, or have taken some pledge or security from him, more than two calendar months before the date and issuing of the commission.(1) The 108th *section* of the new statute accordingly declares, that no creditor having security for his debt, or having made any attachment in London or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or lien upon, any part of the property of the bankrupt before the bankruptcy.(2)

When a creditor comes to prove his debt, he is obliged to swear, whether he has a security for it or not; and if he has, and insists upon proving, he must either deliver it up for the benefit of the creditors (3), or have the value previously ascertained by the sale of it. (4) If it be, however, a *joint* security from the bankrupt and another person, he may then come in for his whole debt under the commission, without being compelled to deliver

(1) *Section 81.*

(2) And see post, as to judgment creditors.

(3) *Ex parte Grove*, 1 Atk. 105.

(4) *Ex parte Smith*, 2 Rose, 64.

up the joint security (1); and he is in that case entitled to take his dividend upon the whole of his demand from the bankrupt's estate, and to recover what he can from the co-surety, provided he does not receive more than 20s. in the pound in the whole. And the same rule holds, where the creditor has a distinct security from a third person for the same debt; for the deduction of such a security is never made from the claim of the creditor, unless it is pledged with the creditor as the property of the bankrupt. (2) It should, however, be produced at the time of proving the debt, in order that the commissioners may mark it as having been exhibited. If a creditor, holding the bankrupt's acceptance, proves his debt without stating that fact to the commissioners, and there are circumstances of suspicion, which make it fit that the assignees should again have an opportunity fully to examine into the debt, the proof will be ordered to be expunged—giving him liberty, however, to go again before the commissioners and tender his proof. (3)

*Debts and creditors.*

Separate securities from third persons,

Exhibit.

Where the creditor thinks, that a security pledged with him by the bankrupt is not of equal value with the debt, he may apply to have it sold, and be admitted as a creditor for the residue; and it makes no difference in this respect, whether the security is a real or personal one; for all personal securities, such as bonds and bills of exchange, may be directed to be sold in the same manner as an estate. (4) And if the security is really of less value than the debt, and the creditor is desirous of voting in the choice of assignees, the Court will sometimes permit him to prove without giving up the security; but then the value of the security or pledge must be deducted, and he can only prove for the difference; and the Court will impose such terms upon him, as that justice may be done to the

When security may be sold, and proof made for the difference.

When proof without giving up security.

(1) *Ex parte Bennet*, 2 Atk. 528.

(3) *Ex parte Hossack*, Buck. 590.

(2) *Ex parte Parr*, 1 Rose, 76.

(4) *Ex parte Hillier*, 1 C. B. L.

*Ex parte Goodman*, 5 Madd. 575.

158.; and see post.

Debts and  
creditors.

estate. (1) Where the security consists of bills, if the creditor is willing to take them at their value on the face of them, the estate in that case cannot be damnified, as they may produce less, but cannot produce more; and his proof must, of course, be admitted for the difference. (2) And the same rule applies, where the value of the security is admitted by all parties (3); but if, in this case, the sale of the security produces more than the value put upon it, the surplus must be carried to the estate, and not applied in reduction of the creditor's proof. (4) And though the right to retain the security is disputed, yet, if the value of it bears a very small proportion to the amount of the debt, the creditor will be allowed to prove for the difference, upon giving security to deliver up the property, if it should turn out that he is not by law entitled to retain it. (5) But where the creditor holds property under what was clearly a *preference*, such an order will not be made. (6)

When  
proof of  
the ba-  
lance of a  
debt  
should not  
be re-  
jected.

The proof of the balance of a debt, which must at all events be due, is not to be rejected or deferred, because there is a question (as to the legality of a part payment of it) to be tried between the bankrupt's estate and the creditor, which the assignees in their discretion may, or may not, put into a course of trial—but which the creditor cannot himself initiate; though it is proper that no divi-

(1) 2 Jac. & W. 221. *Ex parte Nunn*, 1 Rose, 322. *Ex parte Greenwood*, Buck. 523.

(2) *Ex parte Martell*, 1 Rose, 329. Per Lord Eldon.

(3) *Ex parte Nunn*, Ibid. 322.

(4) Ibid.

(5) *Ex parte De Tastet*, 1 Rose, 324.; and see *Ex parte Smith*, 2 Rose, 65. The order in *Ex parte De Tastet* was, that the creditor should give security to deliver up the property, if the *commissioners should be of opinion*, that he was not entitled to retain it; and that the creditor should not reverse their adjudication, by an application af-

terwards to the Lord Chancellor. The reasonableness of imposing these terms, however, seems to be very questionable; for in a complicated case of law and fact, it is somewhat hard to tie the creditor down to the decision of such a tribunal as commissioners of bankrupt, without any appeal from their decision to the Lord Chancellor, or without, at least, permitting him to take the opinion of a judge and jury.

(6) *Ex parte Barclay*, 1 G. & J. 272. *Ex parte Smith*, 3 Bro. 46.; and see post. Section 6.

debt should be paid on that proof, till the question is determined. (1)

*Debts and creditors.*

A creditor, who has not proved, is not entitled to examine the petitioning creditor before the commissioners. (2)

*Disability by not proving.*

When a creditor applies to prove, though he is not bound to criminate himself, he is nevertheless bound to answer all the lawful enquiries of the commissioners, respecting his claim upon the bankrupt. (3) Therefore, where a creditor was charged by the bankrupt with the receipt of several sums of money,—and refused, upon his examination before the commissioners, any disclosure as to the receipt and application of them, the Lord Chancellor would not allow him to prove his debt under the commission,—as it was necessary that he should, in the first place, discharge himself of the sums of money traced to his hands. (4)

*Creditor bound to answer the commissioner's enquiries.*

A *specialty creditor* has the same right under the bankruptcy of the *heir* of his debtor, as if the heir had not become bankrupt; and may, therefore, follow the real assets of his debtor, or their specific produce, in the hands of the assignees. (5)

*Right of specialty creditor against a bankrupt heir.*

A creditor, who proves his debt, is not thereby estopped from disputing the validity of the commission in an action at law, or from applying to have it superseded. (6)

*As to estoppel of proof.*

Creditors, who come in under the commission, are liable to contribute, in proportion to the amount of their debts, to all the lawful expences of the assignees in recovering the bankrupt's property; and there is no difference, in this respect, between creditors who prove by affidavit, and those who prove in person. (7) But no creditor, being out of England, and proving by affidavit, is liable to pay any contribution on account of his debt. (8)

*But liable to contribute.*

(1) *Ex parte Ackroyd*, 1 G. & J. 391.

(6) *Stewart v. Rickman*, 1 Esp. 108. *Ex parte Bonsor*, 2 Rose, 61.

(2) *Ex parte Steele*, 16 Ves. 161.

(7) *Ex parte Lewthwaite*, 16 Ves.

(3) *Section 46.*

234.

(4) *Ex parte Symes*, 11 Ves. 521.

(8) *Section 46.*

(5) *Ex parte Morton*, 5 Ves. 449.

**Debts and creditors.**

Creditor may appeal to the Lord Chancellor.

As an appeal lies to the Lord Chancellor, on petition, from every determination of the commissioners, — if a creditor, therefore, upon his proof being rejected by them, considers himself aggrieved, his proper course is to petition the Chancellor to be admitted to prove. (1) But he cannot petition to prove a larger debt, than what he offered to prove before the commissioners. (2) Under special circumstances, however, a creditor may petition to prove in the first instance, without tendering his proof previously to the commissioners (3); though such an application should not in general be made, until the commissioners have rejected the proof. (4) If the commissioners also have improperly admitted proof of a debt, redress must be sought by the assignees, by petition, and not by bill. (5)

Punishment for perjury.

If any creditor, or other person, wilfully and corruptly swears falsely (6) in any deposition or affidavit, or (being a Quaker) makes a false affirmation, he is liable to be prosecuted for perjury.

The new statute to be construed favourably for creditors.

The present statute declares, that it is to be construed beneficially for creditors (7), in conformity with an opinion formerly expressed by Lord Mansfield, as to the interpretation of the former bankrupt laws; namely, that they should receive a construction favourable for creditors, and the suppression of fraud.

(1) *Clarke v. Capron*, 2 Ves. 666.

(2) *Ex parte Fry*, 3 Mad. 152.

(3) *Ex parte Moody*, 2 Rose, 414. *Ex parte Smith*, 1 G. & J. 74.

(4) *Ex parte De Tastet*, 1 V. & B. 280.

(5) C. B. L. 150.

(6) Section 94. Formerly, be-

sides the punishment for perjury, he was liable to pay double the sum sworn to, or affirmed to be due, to be divided amongst the bankrupt's creditors. See 5 G. 2. c. 30. s. 29. *Holmes v. Walsh*, 7 T. R. 458.

(7) 1 Burr. 474.

## SECTION II.

*Of the Creditor's Election to sue the Bankrupt, or to prove his Debt.*

A creditor, by proving his debt under the commission, was not formerly concluded to have made an absolute election, not to proceed at law against the bankrupt; though the Lord Chancellor would, on application, put him to his election, either to come in under the commission, or to proceed with his action. Some refined distinctions, too, appear to have been drawn in the different cases (which are somewhat at variance with each other), as to the particular period of putting him to his election—whether before, or after, a dividend was declared—or whether there should not, at the least, be funds in the hands of the assignees sufficient to make a dividend. (1) If the creditor elected to proceed with his action, he was still allowed to prove his debt, for the purpose of assenting to, or dissenting from, the certificate; as the certificate would, of course, operate to the discharge of the bankrupt from that action, as well as all his debts contracted before the act of bankruptcy. (2) A *petitioning* creditor, however, was always held to have determined his election; for if he had been permitted to proceed at law, after taking out the commission, the commission itself must have been superseded,—which would have affected all the creditors who had proved debts under it. (3)

Former practice.

Petitioning creditor.

But now, by Section 59. of the new act, (which adopts the provisions of the 49 Geo. 3. c. 121. s. 14.) any creditor, who has brought an action, or instituted a suit, against the bankrupt, in respect of a demand prior to the bankruptcy, must now relinquish an action, before proof.

Creditor must now relinquish an action, before proof.

(1) C. B. L. 134.

Ex parte *Ward*, Ibid. 153. Ex(2) Ex parte *Dorvilliers*, 1 Atk.parte *Crinsoz*, 1 Bro. 270.; and see221. Ex parte *Lindsay*, Ibid. 220.

1 Mont. Dig. 70. 2 Christ. B. L.

Ex parte *Capot*, Ibid. 219.

481. 8 T. R. 344. 3 Ves. 1. 1 V.

(3) Ex parte *Wilson*, 1 Atk. 152.

&amp; B. 315.

**Election.**

Proof  
deemed an  
election.

Where the  
action a  
joint one.

Where  
commis-  
sion super-  
seded, cre-  
ditor not  
to be pre-  
judiced.

Two cases  
of proof.

Where  
action  
brought  
*before*, and  
*after*  
proof.

or which might have been proved as a debt under the commission, is not permitted to prove, or to have any claim entered upon the proceedings, unless he relinquishes the action or suit. (1) And in case the bankrupt is detained in prison at the suit of such creditor, the latter must then give a sufficient authority in writing for his discharge. The proving, or claiming, a debt under the commission, is also deemed an election by the creditor, to take the benefit of the commission with respect to the debt so proved, or claimed. The creditor, however, is protected from any liability to pay the costs of the action or suit so relinquished, either to the bankrupt, or his assignees. Where the action is a *joint* one against the bankrupt and another person, the relinquishment of it against the bankrupt will not affect the action, as to such *other* person. If the commission should be afterwards *superseded*, the creditor may then proceed in the action against the bankrupt, as if he had not elected (2) — and, if the action was a *bailable* one, may arrest the defendant *de novo*, if he has not put in or perfected bail, — and if bail has been put in or perfected, he may then proceed against the bail.

This section embraces, though it does not expressly provide for, two distinct cases of proof; — the one, where an ACTION has been brought *before* the debt is proved, — and the other, where the *debt* is proved *previously* to the commencement of any action. With respect to the *first* case, viz. where the action is brought *before* the proof, the words of the statute are very general, and seem to amount to an absolute prohibition from proving *any* debt, without relinquishing the action pending, whether brought in re-

(1) It was the practice, however, of the commissioners for some time before the 49 G. 3. c. 121. to insist upon this relinquishment on the part of the creditor. *Ex parte Botterill*, 1 Atk. 109. 1 C. B. L. 130. *Ex parte Wilkinson*, 1 Atk. 83.; and see *Ex parte Woolley*, *infra*.

(2) Before this provision in the statute, if the creditor had the bankrupt in execution, and had elected to come in under the commission, he could not retake him, if the commission was afterwards superseded.



spect of the debt offered to be proved, or of any other, *Election.*  
 As to the other case of proof, viz. where the action is brought *after* the proof of the debt, the enactment amounts only to a declaration of the legal effect of such proof or claim, — which is confined to the *debt so proved or claimed.*

Where a creditor, therefore, has two distinct demands against the bankrupt, for one of which he brings an action against him before the bankruptcy, and then proves the other under the commission, the proof of this debt is an election to relinquish the action for the other, and to come in as a creditor for *both debts* under the commission. (1) And where the creditor, instead of proving, presents merely a petition to be admitted to prove one of his demands, he is equally stopped from continuing his proceedings at law against the bankrupt for the other (2); for the presentation of such a petition is as much a pledge to prove, as entering a claim would be, and operates in itself as an election to come in under the commission. (3) So, where a creditor obtained an order for an enquiry before the commissioners, and before the order was drawn up took out execution upon a judgment then pending against the bankrupt, the Lord Chancellor ordered the goods to be restored, and put in the same situation as they were at the time of the order, — declaring, that a creditor obtaining an order at his own instance should not be suffered to take out execution, without first applying to set that order aside, or procuring the leave of the Court. (4) So, if one creditor accepts an assignment from another of a debt proved, he is substan-

Where the action *before* proof. Petition to prove an election.

So obtaining any order;

or an assignment of a debt

(1) *Ex parte Dickson*, 1 Rose, 98. Before the 49 G. 3. c. 121., where a creditor had two demands against the bankrupt of a different nature, he might prove one under the commission, without relinquishing an action pending for the other; and his election to come in under the commission as to one debt, did not compel him to make it as to

both. *Ex parte Crinsoz*, 1 Bro. 270. *Ex parte Botteril*, 1 Atk. 109. *Ex parte Mathews*, 3 Atk. 817.

(2) *Ex parte Hardenburgh*, 1 Rose, 204.

(3) *Ex parte Blaydes*, 1 G. & J. 179. *Ex parte Irving*, Buck. 423. *Ex parte Lord*, Ibid.

(4) *Ex parte Boanmet*, 1 Rose, 181.

**Election.**

already  
proved.

Creditor  
issuing ex-  
ecution  
upon a  
verdict  
subject to  
an award.

Joint and  
separate  
creditor  
having  
issued  
execution.

Execution  
before  
bank-  
ruptcy.

Where  
action  
brought

tially a creditor proving himself under the commission, and thereby relinquishes an action previously brought against the bankrupt for his own debt. (1)

Where a creditor of the bankrupt, previous to the commission, obtained a verdict against him for a nominal sum, in an action for money had and received, subject to a reference,—and after the award was made (which was subsequent to the commission) entered up judgment for the debt and costs, and then proved the debt under the commission, and afterwards took the bankrupt in execution for the costs,—the Lord Chancellor ordered him to be discharged,—and that the creditor should pay the costs, unless he could produce an affidavit, that the commissioners had stated to him, that he had a right to seize the person of the bankrupt. (2) It has been holden, however, that where a *separate* commission issued against one of a firm, and a *joint and separate* creditor had taken out execution against the bankrupt for his *joint* debt, he was still entitled to prove his *separate* debt, without giving up his execution. (3) And where a creditor *before* the bankruptcy *seized* the effects of the bankrupt under an execution—though the goods were not sold till after the commission issued—yet the creditor was allowed to retain his execution, and prove for the residue of his debt; for the above clause of the statute was held not to apply to a case of this nature. (4) But if the validity of such execution is disputed, and the goods are not turned into money, he will not then be permitted to have a value set upon the goods, and to prove for the residue of his debt, in order to vote in the choice of assignees. (5)

But where an action for one of two distinct debts is brought *after* the proof of the other, the creditor in this

(1) Ex parte *Taylor*, 1 G. & J. 399.

(2) Ex parte *Haynes*, 1 G. & J. 107.

(3) Ex parte *Stanborough*, 5 Mad. 89.

(4) Ex parte *Hopley*, 1 G. & J. 63. S. C. 2 Jac. & W. 220.; and see Section 108.

(5) Ex parte *Hopley*, 1 Jac. & W. 423.

case is not deprived of his right of action; for the words of the statute do not make the proving or claiming a debt an election, with respect to separate and distinct debts, — but only “with respect to the debt so proved or claimed,” and also with respect to any action *then pending*. Thus the holder of two bills of exchange may prove for the one, and afterwards sue the bankrupt on the other, notwithstanding the bills were given by the bankrupt for debts of the same nature, namely, for goods sold by the creditor to the bankrupt. (1) The Lord Chancellor will, however, under circumstances that justify his interference in such a case, order that the creditor shall be restrained from suing the bankrupt on the other bill. (2)

Election.

after  
proof.

A creditor, who proves under a *second commission* — though the bankrupt's estate under that commission does not pay 15s. in the pound, and he afterwards acquires future effects — has been held, nevertheless, to have made his election not to proceed against the bankrupt at law, in respect of such future effects. (3)

Proof  
under a  
second  
commis-  
sion.

But the above provision in the statute, as to the proof or claim of a debt determining the creditor's election, only applies to the *creditor* so proving or claiming, or entitled to the benefit of any proof or claim, and will not affect the rights or the liability of a *third person*. Therefore, proof by the creditor will not prevent the *surety* from suing the bankrupt, unless, indeed, the surety is estopped (4) by his own act, or by the bankrupt having obtained his certificate. (5) Neither will it affect the claims of the *creditor against the surety* of the bankrupt; for the legislature considers the proof against the principal as a benefit to the surety. (6) So, if the holder of a bill of exchange proves

Proof does  
not affect  
rights of  
third per-  
sons;

as a surety,

or a party  
on a bill

(1) *Harley v. Greenwood*, 5 R. & A. 95. *Ex parte Glover*, 1 G. & J. 270. *Howell v. Gollidge*, 5 Taunt. 174.

(2) *Ex parte Lobbon*, 17 Ves. 334.

(3) *Reed v. Sowerby*, 3 M. & S. 78.

(4) *Townend v. Downing*, 14 East, 565. *Ex parte Lobbon*, 17 Ves. 334.; and see post. “Sureties.”

(5) *Fanshagan v. Crosbie*, 8 Taunt. 550. 2 Moore, 602.

(6) *Ex parte Hughes*, 5 B. & A. 484.

**Election.**  
 of ex-  
 change.

it under a commission against the acceptor, and the drawer afterwards pays the amount to the holder, the proof of the holder under the commission will not be considered an election binding upon the *drawer*, so as to preclude him from bringing an action on the bill against the acceptor. (1)

Proof does  
 not affect  
 remedy  
 against  
 other  
 persons  
 jointly  
 liable.

A creditor, also, is not prevented by proof of his debt, from suing any other person jointly liable with the bankrupt; therefore, proving a joint debt under a separate commission against one partner, will not prevent the creditor from suing the other partners (2) of the bankrupt. And where separate commissions were issued against three of four partners, and a joint creditor, under an order of the Lord Chancellor, proved his debt under one of the commissions, and afterwards sued all the partners for the same debt, and arrested one of the other two, under whose commissions he had not proved, — it was held, that there was no objection to this proceeding, as the proof against the estate of *one* was not an election as to the estate of the *others*. (3) And in every case of this kind, if the rules of pleading require it, the creditor may make the bankrupt a co-defendant, upon indemnifying him against the consequences of his being made a party to the action. (4) But though the Lord Chancellor will order such an indemnity to be given, or else that the bankrupt's name shall be struck out of the action, — yet a court of law will not grant the bankrupt this relief, but leave him to plead his bankruptcy. (5)

No rule  
 to discon-  
 tinue ne-  
 cessary be-  
 fore proof.

As the proof or claim by the creditor operates, of itself, as a discontinuance of any action previously brought against the bankrupt, it is not necessary for the creditor to produce any rule of discontinuance in the action, in order to entitle him to prove; and, indeed, that proceeding might

(1) *Mead v. Braham*, 3 M. & S. 91.

(2) *Heath v. Hall*, 4 Taunt. 326.

(3) *Young v. Glass*, 16 East, 252.

(4) *Ex parte Read*, 1 Rose, 460. 1 V. & B. 346.

(5) 1 Rose, 461. note (a).

be detrimental to his rights against the bankrupt, as there is an uncertainty, whether his proof will be admitted or not. (1) And when the bankrupt is in actual custody at the suit of the creditor, the latter is entitled to the judgment of the commissioners upon his right to prove or claim, before he discharges the bankrupt; though the bankrupt must be actually discharged, and the action and all benefit from it relinquished, before the proof or claim is admitted on the proceedings. (2) The new act, we have seen (3), provides, that the creditor in such a case must, before proving, give a written authority for the discharge of the bankrupt, — which will now save the bankrupt the trouble and expence of applying to the Lord Chancellor, or to the court in which the action is pending, in order to be discharged. When the creditor has been permitted to prove, the bankrupt is entitled to have some entry or suggestion recording the election, put on the record in the court, where the action was brought. (4) The proof of the debt, however, does not operate so as to enable the bankrupt to *plead* it in bar to an action, — but only gives him an opportunity of applying for relief to the Lord Chancellor, or to the Court where the action is brought, to stay proceedings in the action. (5)

The being chosen an assignee merely of the estate of a bankrupt, will not prevent a creditor from suing the bankrupt at law, provided he has *not proved* his debt. (6)

When a creditor has proved under the commission pending an action against the bankrupt, the *Bail* will, of course, be discharged, as well as the bankrupt, from the consequences of the action, unless the commission is superseded; and in that case the statute provides (7), that the creditor may proceed against the bail. For, in order to

*Election.*

When bankrupt in actual custody.

Proof may be entered on record,

but cannot be pleaded.

Being chosen an assignee not an estoppel.

Proof discharges bail.

(1) *Ex parte Woolley*, 1 Rose, 394. 1 V. & B. 253.

(2) *Ex parte Frith*, 1 G. & J. 165.

(3) *Ante*, 184.

(4) *Kemp v. Potter*, 6 Taunt. 549.

(5) *Harley v. Greenwood*, 5 B. & A. 95.

(6) *Ex parte Ward*, 1 Atk. 152.

(7) *Section 59.*

**Election.**

proceed against the bail after judgment, it is necessary to take out a *capias ad satisfaciendum* against the principal, as *they* are only liable, in case the defendant cannot be taken upon that writ. And the *ca. sa.*, being process in the action, (which the creditor is obliged to relinquish upon proving his debt) becomes after such proof, nothing but a mere piece of waste paper; and the bail are consequently not answerable for the appearance of their principal at the return of the writ, and are incapable of being fixed. (1)

Petitioning creditor concluded by the commission.

A petitioning creditor, it has been already observed, is always considered to have made his election not to sue the bankrupt at law (2); and though the commission be not opened, yet if it is capable of prosecution, he is equally bound. (3) He need not, however, relinquish his action before he *petitions* for the commission, the statute only applying to *proof, or claim* (4); but he must do so, of course, before he proves at the opening of the commission. (5)

Where creditor takes the body in execution, after the commission.

Where a creditor, *after* a commission is sued out, takes the *body* of the bankrupt in execution, it is a *conclusive* election; and he will not be entitled to prove, so as to receive a dividend, although he should afterwards discharge the bankrupt out of custody. For the taking the body of a defendant in execution is considered, in law, a satisfaction of the debt (6); and though he discharges his person afterwards, he cannot resort to the debtor's effects. (7) And even in the case of an *agent*, who without the authority or knowledge of his principal (who was abroad) took the bankrupt in execution *after* the issuing of the commission, this was held to be an (8) election by the principal. But

(1) *Linging v. Comyn*, 2 Taunt. 246. *Aylett v. Harford*, 2 Bl. 1317.

(2) *Ante*, 183.

(3) *Ex parte Prowse*, 1 G. & J. 92.

(4) *Bryant v. Withers*, 2 Rose, 8.

(5) 2 Christ. B. L. 485.

(6) *Ex parte Hicklin*, C. B. L. 131. *Ex parte Warder*, *Ibid.* 132.

*Ex parte Caton*. *Ex parte Rattray*, *Ibid.* *Ex parte Knowell*, 13 Ves. 192.

(7) *Ex parte Billon*, C. B. L. 133. *Ex parte Hewitt*, *Ibid.*

(8) C. B. L. 132.

the taking a bankrupt in execution will not deprive the creditor of his right to prove, for the purpose of dissenting from the certificate; for if the bankrupt obtain his certificate, he will then be discharged at once from the execution. (1)

But where a writ of *ca. sa.* is lodged with the sheriff for the purpose merely of fixing the bail, and the bankrupt surrenders in discharge of his bail, but is never actually charged in execution by the creditor, — in this case, the creditor's election is not determined. For the surrender of a defendant in discharge of his bail is his own voluntary act, and does not amount to charging him in execution by the creditor: but if he be not discharged by the creditor before the expiration of two terms, then the case will be (2) different. And the mere issuing of a *ca. sa.*, if the defendant be not taken under it, is not enough to determine the creditor's election. (3) So, if the creditor has taken the bankrupt in execution *before* the issuing of the commission, the creditor, in that case, is not concluded, but has his election, either to continue him in execution, or to come in under the commission (4); for there can be no election as to proof, where there is no commission. But when a creditor has taken his debtor in execution, he cannot be a petitioning creditor. (5) An attachment of the bankrupt after the commission is issued, for nonpayment of money *into court*, under an order in a suit instituted against him *before* the commission issued, is not considered a proceeding against his person in satisfaction of the debt, — and, therefore, not such an election, as will prevent the creditor from proving. What might have been the effect of attaching the defendant, if the order had

Election.

Where defendant surrenders in discharge of his bail.

When creditor taking bankrupt in execution *before* commission, not concluded.

When attachment for not paying money *into Court*, does not conclude the creditor.

(1) *Ex parte Chadwick*, C. B. L. 133. *Ex parte Hopkinson*, 1 Ves. 159.  
(2) *Ex parte Cundall*, 6 Ves. 446. *Ex parte Arundel*, 1 Rose, 143. 18 Ves. 251.

(3) *Ibid.*  
(4) *Ex parte Hicklin*, *supra*. *Ex parte Du Paz*, C. B. L. 134.  
(5) *Burnaby's case*, 1 Str. 653.

**Election.**

Landlord  
cannot dis-  
train after  
proof.

been to pay the money to *the party himself*, Lord Eldon would not determine. (1)

A landlord, formerly, when he distrained and proved also for the amount of his rent, was put to his election to waive his proof, or his distress. (2) But now, it should seem, when he has once proved the amount under a commission, he cannot, consistently with the provision of the statute, distrain for it afterwards; — for the statute says, that the proof by *any* creditor shall be deemed an election, with respect to the debt so proved.

As to the election of a *joint creditor* suing out a *separate commission* to prove against the *joint*, or *separate*, estate, — see post, title “Partners.”

## SECTION III.

*Time of Proof.*

Special  
meeting.

A creditor may prove his debt at any of the three public meetings of the commissioners, — (which, we have seen, are appointed by them when they declare the party bankrupt) as well as at any other public meeting to declare a dividend, or for other purposes, — or at any meeting specially appointed by them for the proof of debts, of which ten days' previous notice has been given in the London Gazette. This last is also considered a public, and not a private meeting; and any creditor may have one called for the proof of his particular debt, upon paying the expenses of the meeting.

Creditor  
may prove  
at any  
time  
before a  
final  
dividend.

In the early administration of the Bankrupt law, it was considered, that after any dividend declared of the bankrupt's effects, a creditor could not be admitted to prove his debt, unless under particular circumstances. (3) But

(1) *Ex parte Benjamin*, Buck. 41.

(2) *Ex parte Grove*, 1 Atk. 105.

(3) Hob. 287. Hutt. 38. Good.



such a restriction has a long time ceased; and any creditor, *Time of  
proof.*  
now, before a final dividend is declared (unless there have been gross laches on his part) is entitled to prove his debt, so as not to disturb any former dividend. And he has a right to be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a fresh one. (1) Where a creditor, however, laid by for fifteen years after the date of the commission, when both the bankrupt and the assignees were dead, Lord Hardwicke would not allow him, under these circumstances, to be admitted a creditor. (2)

#### SECTION IV.

##### *Manner of Proof.*

The usual mode of proof (3) is for the creditor to attend in person before the commissioners, and make oath (or if he is a quaker (4), affirmation) of the truth and justice of his debt; — which, if not objected to by the bankrupt himself, or any of the creditors, within a reasonable time, is conclusive (5); but if any well founded objection is raised, the demand must be substantiated by further evidence. For notwithstanding the creditor makes a positive oath of the debt, if the commissioners have any just grounds to doubt its fairness, they ought to admit it only as a claim; — or, indeed, it may be rejected entirely, if it is not made out in any way to their satisfaction. (6) For the jurisdiction of the commissioners in this respect, like that of the Lord Chancellor, is both legal and equitable. Thus they not only may, but are bound to enquire into the consideration of a debt, notwithstanding a verdict; for if there are equitable grounds to impeach the verdict, they may

Creditor must attend in person.

Proof may be rejected.

Commissioners may enquire into consideration.

(1) *Ex parte Stiles*, 1 Atk. 209.

(5) *Bromley v. Goodere*, 1 Atk.

(2) *Ex parte Peachy*, 1 Atk. 111. 77.

(3) And see *Section 46*.

(6) *Ex parte Simpson*, 1 Atk. 70.

(4) *Section 99*.

*Ex parte Wood*, *ibid.* §21.

Manner of proof.

## Form of deposition.

## When proof may be made by affidavit.

## Corporation may prove by an agent.

## Where the oath of creditor dispensed with.

reject (1) the proof; and even though there be a judgment, it seems, that the commissioners may also enquire into the (2) consideration; and the same in the case of proof being tendered on an award. (3) The proper form of the creditor's deposition is, that the debt was due and owing before, and at the date and suing forth of the commission. (4)

If any creditor lives remote (5) from the place of meeting of the commissioners, he may then prove his debt, by making an affidavit of it before a master in Chancery; — or in case he lives out of England, then by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister, or consul. Where a creditor in such a case died, after making the affidavit, and *before* it was *exhibited* to the commissioners, the admission of the affidavit in proof was considered irregular, and the commissioners were directed to review the proof, although no dividend had been paid (6) upon it.

A *Corporation*, or any *public Company* incorporated by charter or act of parliament, may prove by an agent, provided the agent make oath that he is such agent, and authorized to make the proof. (7) But any person applying to prove for any other creditor must produce his authority, and have it exhibited. (8)

In one case where the creditor was *abroad*, and it was impossible to liquidate and adjust the accounts between him and the bankrupt, before the holding of a particular meeting

(1) *Ex parte Rashleigh*. *Ex parte Butterfil*, 1 Rose, 192.

(2) 1 V. & B. 214.

(3) *Ex parte Hemstead*, 1 Rose, 149.

(4) *Bamford v. Burrell*, 2 Bos. 1.

(5) *Section 46*.

(6) *Ex parte Bridges*, 4 Mad. 269.

(7) It was formerly necessary to exhibit the appointment of the agent under the common seal of the corporation; (*Green*, 117.) and

in the case of the Bank of England, a clerk was obliged to produce a power of attorney to enable him to prove a debt due to the Bank. *Ex parte Bank of England*, 18 Ves. 228. 1 Rose, 142. 1 Wils. 295. And now also a power of attorney is necessary to enable the agent to vote in the choice of assignees. *Vide Section 61*. 1 Wils. 295. 1 Swanst. 10.

(8) C. B. L. 130.

the oath of the creditor	<i>Manner</i>
of the Lord Chan-	<i>of proof.</i>
to receive the	
ful, how-	
in the pre-	
under these	
g but claim.	
at the bankrupt, the	Proof by
in the deposition, and	a trustee.
to the commissioners. (2)	
and applies to prove, the	Assignee
of, and the bond and assign-	of a bond.
.(3)	
bankrupt, one of the admirals may	Navy
self and of the crew. (4)	agent.
an infant creditor, he will be permitted	Infant
ove by his (5) guardian.	creditor.
creditor of the bankrupt became <i>deranged</i> in	Where
and a friend, at the request of the creditor's	creditor
had undertaken the superintendence and manage-	insane.
of his business, such person was permitted to prove	
debt due to the creditor from the bankrupt, and to	
vote in the choice of assignees, without a commission of	
lunacy being issued—upon an affidavit of the facts, and a	
certificate of a physician that the creditor was deranged. (6)	
Where the bankrupt is an <i>executor</i> or <i>trustee</i> , and ap-	Where the
plies to prove against his own estate, the commissioners	bankrupt
should not receive the proof without a special order of the	is an ex-
Lord Chancellor, to which is always annexed a condition,	ecutor or
that the dividends received under such proof are not to	trustee.
come into the hands of the bankrupt. (7)	

(1) *Ex parte Young*, C. B. L. 121.  
 (2) *Green*, 149. *Beardmore v. Crutenden*, C. B. L. 211. *Ex parte Debois*, 1 Cox, 310.  
 (3) 1 Mont. Dig. 145.  
 (4) *Ex parte Russel*, 4 Mont. B. L. 78.

(5) *Ex parte Belton*, 1 Atk. 251.  
 (6) *Ex parte Malby*, 1 Rose, 387.  
 (7) *Ex parte Shaw*, 1 G. & J. 161., and see post, p. 222. *Sect. 10.*

**Manner  
of proof.**

Securities  
must be  
produced.

Appeal to  
the Chan-  
cellor.

Every *security* that a creditor has for his debt must be produced at the time of his proving, when the commissioners mark them as having been exhibited; and if he has a *judgment*, an office copy of it must be exhibited. (1)

If the commissioners improperly admit, or reject, a proof — the proper course is, to petition the Lord Chancellor to have the proof admitted, or expunged. (2)

## SECTION V.

*Of Judgment Creditors.*

Judgment  
creditors  
not pre-  
ferred to  
the rest;

nor an  
execution  
creditor,  
where the  
judgment  
by default  
or confes-  
sion.

Order of  
the Court  
of Chan-  
cery.

A judgment creditor is not entitled to receive more than a rateable part of his debt (3), except in respect of an execution, or extent, served and levied by *seizure* upon the property of the bankrupt before (4) the bankruptcy. And no creditor, though for a valuable consideration, who even sues out execution upon any judgment obtained by *default*, *confession*, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors.

An Order of the Court of Chancery for the payment of money may be proved under a commission, and as a debt proveable, will be barred by the certificate. (5)

But money due upon a judgment for mesne profits, or a

(1) C. B. L. 129. *Ex parte Wil-  
hamson*, 1 Atk. 83.

(2) *Clarke v. Capron*, 2 Ves. 666.  
C. B. L. 130.

(3) See *Section* 108.

(4) And see *Newland v. —*,  
1 P. Wms. 92. *Orlebar v. Fletcher*,  
ibid. 737. *Sharpe v. Roahde*,  
2 Rose, 192. In the 2d vol. of  
Schoales & Lefroy's Reports, 425.  
there is a dictum of Lord Redes-  
dale, that if judgment was entered  
up before the bankrupt was a  
trader, it binds the lands, not-

withstanding subsequent trading  
and bankruptcy, although execu-  
tion is not issued. But this observ-  
ation of that learned judge was  
intended to apply only to the Irish  
bankrupt act (the 11 & 12 G. 3.  
c. 8. s. 5.) and was not meant to  
extend to the Bankrupt law of  
England.

(5) *Ex parte Parker*, 3 Ves. 554.  
*Wall v. Atkinson*, 2 Rose, 196. In  
the matter of *M'Williams*, 1 Scho.  
& Lef. 174.

judgment in an action for damages on a tort — where the verdict is *after* (1) the bankruptcy of the defendant — or where the verdict is even before, but the judgment is not signed till *after* the act of bankruptcy, and after the issuing of the commission (2) — is not in either of such cases proveable. A verdict, indeed, is only *prima facie* evidence of a debt, which the creditors of the bankrupt are at liberty to (3) impeach, and into the circumstances of which, if impeached, the commissioners, as we have before seen (4), are bound to enquire. Where the plaintiff, however, in an action of trespass (having obtained a verdict) signed final judgment *before the commission* issued, though after the act of bankruptcy, the Court of King's Bench have lately decided, that the judgment was proveable, as being a debt *bona fide* contracted between the act of bankruptcy and the issuing of the commission, within the meaning of the 46 G. 3. c. 135. s. 2. — and, consequently, within the meaning, also, of the *forty-seventh* section of the new statute, which adopts that clause of the former act. (5) And in a still more recent case, though the judgment was not actually signed till three days *after* the commission issued, it was held, nevertheless, to relate back to the first day of the term in which it was signed — and this being *before* the issuing of the commission, the judgment was held to be proveable. (6)

*Judgment  
creditors.*

*Judgment  
signed  
after act  
of bank-  
ruptcy.*

*Before  
commis-  
sion.*

*After com-  
mission.*

Where a creditor is entitled to prove in respect of any judgment, decree, or order, he may now also prove for the costs, though the costs were not taxed at the time of the bankruptcy. (7)

*Costs.*

(1) *Moggridge v. Davis*, Wightw. Rep. 16.

(2) *Buss v. Gilbert*, 2 M. & S. 70.; and see post, "Costs."

(3) *Ex parte Rashleigh*, 1 Rose, 192.

(4) *Ante*, 193.

(5) *Robinson v. Vale*, 2 B. & C. 762.

(6) *Ex parte Birch*, 4 B. & C. 880.

(7) *Section 58.*; and see post, *Section 19. "Costs."*

## SECTION VI.

*Of Creditors having a Mortgage, or equitable Lien.*

Assignees  
may pay  
off mort-  
gages  
before  
forfeiture.

When a creditor has a mortgage from the bankrupt, or any property pledged by him upon condition or power of redemption at a future day, the assignees may, by the *seventieth* section of the new statute, before the time limited for the performance of such condition, make tender or payment of money or other performance, according to such condition, as fully as the bankrupt might have done; and may afterwards sell and dispose of the mortgaged premises for the benefit of the creditors.

After for-  
feiture,  
mortgage  
must be  
sold, and  
proof  
made for  
the resi-  
due.

But if the mortgage is forfeited, and the creditor apprehends it is not equal to the payment of his debt, he must then apply to the commissioners to have the mortgage sold, and be admitted to prove for the residue. Or he may, if he chooses, file a bill against the assignees for a foreclosure — and that, even before the execution of the bargain and sale to the assignees by the commissioners. (1)

Mode of  
proceed-  
ing when  
mortgage  
sold.

In order to have the mortgage sold, a special application to the Lord Chancellor was formerly necessary (2); but this may be done now under the general order (3) — by which the commissioners are directed to have the mortgage sold, either before them, or by public auction, previously causing due notice to be given in the London Gazette, and in such other of the public papers as they shall think fit, of the time and place of sale. The proceeds of the sale (4) are to be applied — first, in payment of the expenses attending the sale, and then in payment of what is due to

(1) *Bainbridge v. Pinhorn*, 1 Buck. 135.

(2) *Ex parte Howell*, 7 Vin. 101. *Ex parte Coming*, 9 Ves. 115. *Ex parte Wetherell*, 11 Ves. 398. *Ex parte Haigh*, *ibid.* 403. *Ex parte Twogood*, 19 Ves. 231

(3) Lord Loughborough, 8th March, 1794.

(4) As to the rules for conducting the sale of the bankrupt's property, whether under the general, or a special, order, see post, "Assignees."

the mortgagee for principal, interest, and costs; and in case the proceeds are not sufficient for that purpose, the mortgagee may be admitted a creditor for the deficiency. But he can only prove for interest up to the date of the commission. (1)

*Mortgages.*

*Interest.*

The commissioners have jurisdiction, under this order, to take an account of the expenses attending the sale of the mortgaged premises, and to tax the costs of all parties. (2) And where it is merely a question of convenience, it will be left to the assignees to choose, whether the mortgage accounts shall be taken before the commissioners, or the Master. (3)

As to taking the mortgage account.

All *personal securities*, which are merely pledged or deposited by the bankrupt with the creditor, may (we have seen (4)) as well as mortgages, be directed by a special order to be sold before the commissioners (5); but in this case the assignees are alone entitled to insist upon the sale. (6)

*Personal securities may be also sold.*

Where there is a *second mortgagee*, who does not claim under the commission, but rests upon his security — whether it be a legal or an equitable mortgage — neither the commissioners, nor the Lord Chancellor, have power to compel him to join in the sale obtained by a prior mortgagee. (7) But where a second mortgagee elects to abandon his security and come in under the commission, under the impression that the first mortgagee will not receive sufficient by the sale of the estate to pay off his mortgage, but upon a sale there turns out to be a surplus, — the second mortgagee in this case will not be allowed to withdraw his proof, and be remitted to his mortgage. (8) When the second mortgagee will not consent to join in a sale, the

*Second mortgagee not bound to join in sale.*

But if he proves, he waves his right to any surplus from it.

Where second mortgagee

(1) Ex parte *Wardell*, C. B. L. 195. Ex parte *Harey*, *ibid.* Ex parte *Badger*, 4 Ves. 165.

(2) Ex parte *Mather*, 1 G. & J. 342.

(3) Ex parte *Ansley*, Buck. 292.

(4) Ante, 179.

(5) Ex parte *Hillier*, C. B. L. 123.

(6) Ex parte *Troughton*, C. B. L. 124. Ex parte *Gardner*, *ibid.*

(7) Ex parte *Jackson*, 5 Ves. 357. Ex parte *Topham*, 1 Mad. 38.

(8) Ex parte *Downes*, 1 Rose, 96. 18 Ves. 290.

**Mort-  
gages.**

refuses to  
join in the  
sale.

better plan seems to be for the assignees to request the commissioners to call before them both mortgagees, and examine them as to the amount of the principal and interest due on their respective mortgages. The assignees may then advertise the estate for sale, subject to the two mortgages; — and if more is bid for it than what is due on both, the assignees, or the purchaser, can in that case redeem them. If there is no advance, both mortgagees will then be left to their usual remedy, and the assignees will have no further interest in the premises. (1)

When  
mortgagee  
entitled to  
an injunction.

A mortgagee has a right to have the estate sold in the same plight, as it was in at the time of the bankruptcy. Therefore, where the bankrupt (before assignees were chosen) was proceeding to cut underwood which he had mortgaged, the Lord Chancellor, upon the application of the mortgagee, granted an injunction to restrain him from so doing. (2)

Where  
mortgagee  
wishes to  
bid at sale.

Where a mortgagee wishes to bid at the sale as a purchaser of the property mortgaged, it is usual for him to apply by petition for leave to do so (3), undertaking to make good the deficiency between the sum bid and the price to be fixed by the Master, in case the latter should not approve of the bidding. (4) But though it is the practice for the mortgagee to apply to the Court, it has been doubted whether such an application is absolutely necessary; as it is always competent to him to purchase from the mortgagor the equity of redemption, and the bankruptcy does not seem to make any difference. (5) If, indeed, the mortgagee has a power of sale given him by the mortgage, he is then considered in the light of a trustee, who is in general disabled from purchasing for himself (6); but, in Bankruptcy, he may waive his special

(1) 2 Christ. B. L. 323.

(2) *Hampton v. Hodges*, 8 Ves. 105.

(3) *Ex parte Ducane*, Buck. 18.  
*Ex parte March*, 1 Mad. 148.

(4) *Re Salisbury*, Buck. 349.

(5) *Ex parte Hammond*, Buck. 464.; and see Sugden, Law V. & P. 572.

(6) *Downes v. Grayebrooke*, 5 Mer. 206.



power of sale, and apply for one in his general character of mortgagee, — when liberty will be given to him to bid, the sale being before the commissioners, and conducted by the (1) assignees. When a mortgagee becomes the purchaser of the premises mortgaged, he is liable for the expenses of the sale — if it does not produce a sum equal to pay those expenses, as well as the amount of his mortgage. (2)

*Mortgages.*

When the purchaser, liable for expenses.

Sales by auction of any real or personal estate of the bankrupt are, by the 68th section of the statute, declared to be free from any auction duty. But it seems, that property which the bankrupt has mortgaged is (after the mortgage is forfeited) not within this exception, as not being in law any longer the property of the bankrupt. (3)

Auction duty.

The above general order of Lord Loughborough, as to the sale of property mortgaged, applies only to *legal* mortgages, and not to *equitable* ones; in the latter case, therefore, a special order of the Lord Chancellor must be obtained before a sale can be had. An *equitable mortgage* is created by the deposit of title deeds, with an agreement, either written or parol, that they are deposited as a security for the debt; and the mere possession of the

As to *equitable mortgages.*

How created.

(1) *Ex parte Hodgson*, 1 G. & J. 12.

(2) *Boules v. Perring*, 2 B. & B. 457. 5 Moore, 296.

(3) *Coare v. Creed*, 2 Esp. 699. *Rex v. Abbott*, 3 Pri. 178. Mr. Sugden in his *Law of Vendors and Purchasers* (page 12.) thought, that the decision in *Coare v. Creed* could not be supported; but it has been since considerably strengthened by the subsequent case of *Rex v. Abbott*, in which all Mr. Sugden's ingenious arguments, against the liability to the duty, were urged without effect in the Court of Exchequer. Mr. Eden, too, in his *Treatise on the Bankrupt Law*, (p. 100.) conceives that, as the new act declares in general terms, that all sales of the

real or personal property of the bankrupt are exempted from the duty, without confining the exemption (as in the 19 G. 3. c. 56. s. 15.) to "sales by the order of the assignees," the mortgaged property sold under the bankruptcy will not be liable to the duty. But both the above cases were decided on the principle, (independently of the point made in *Coare v. Creed*, that a sale of mortgaged property under the general order, was not a "sale by the order of the assignees,") that the sale, except as to the equity of redemption, was not a sale of the estate of the *bankrupt*, but a sale of the estate of the *mortgagee*.

*Mortgages equitable.*

Validity of, how established.

Difference as to costs, where the agreement is in writing, or by *parol*.

deeds, if no other purpose of deposit is shewn, affords a presumption that the estate was intended to be a security. (1) Disapprobation has been expressed by the present Chancellor of such mortgages being founded on a mere *parol* agreement (2), as leaving an opening to perjury which the statute of frauds was intended to prevent; but he considered the doctrine too long established now to be (3) disturbed. The validity of an equitable mortgage is decided by the Court, without reference to the commissioners; but when the mortgage is established, a reference is then made to them to take an account of what is due on it; or, in doubtful cases, the Court will direct an issue. (4)

In order to discourage equitable mortgages founded on a *parol* agreement, Lord Eldon has introduced the practice of making a difference in the allowance of the costs attending the sale of the property, where the deeds are deposited under the terms of a written agreement, and where there is no agreement in writing. If there is a written agreement, then the costs of the petition for the sale, and of all fair inquiries into the validity of the security, will be ordered to be satisfied out of the proceeds of the sale (5); and though the written agreement requires the aid of *parol* testimony to explain it, the mortgagee will be equally entitled to costs. (6) But where there is no agreement in writing accompanying the deposit of the deeds, the costs are ordered to be paid by the mortgagee (7); — though, if the assignees oppose the petition

(1) *Russel v. Russel*, 1 Bro. 269. *Featherstone v. Fenwick*, *Harford v. Carpenter*, *ibid.* note. Ex parte *Bruce*, 1 Rose, 374.; but see *Lucas v. Dorrin*, *post*, 204.

(2) Ex parte *Hooper*, 2 Rose, 329.

(3) Ex parte *Coming*, 9 Ves. 115. Ex parte *Wetherell*, 11 Ves. 398. Ex parte *Haigh*, *ibid.* 403. *Hankey v. Vernon*, 2 Cox, 12. *Hearn v. Mill*, 13 Ves. 114. Ex parte *Mountfort*, 14 Ves. 606. Ex parte

*Coombe*, 17 Ves. 369.; and see *post*, “Lien.”

(4) Ex parte *Jennings*, 1 Mad. 331. 2 Swanst. 360.

(5) Ex parte *Garbutt*, 2 Rose, 78. Ex parte *Trew*, 3 Mad. 372. Ex parte *Brightwen*, Buck. 148. Ex parte *Sikes*, Buck. 349. 1 Swanst. 3.

(6) Ex parte *Vaurhall Bridge Company*, 1 G. & J. 101.

(7) Ex parte *Warry*, 19 Ves. 472.

for sale on frivolous or mistaken grounds, they will then be ordered to pay the costs occasioned by such opposition. (1) Such a mortgagee, however, is not the more entitled to costs, because it was owing to the bankrupt that no regular mortgage was made. (2)

*Mortgages equitable.*

It is no answer to an application by an equitable mortgagee for the sale of a lease, that it contained a covenant against assigning without licence from the lessor, and that no licence had been obtained; for the lessor might perhaps waive the forfeiture, and the mortgagee has a right, as against the assignees, to avail himself of the advantage which he has by the possession of the lease. (3) When the property is sold, the assignees must join in the conveyance; for an equitable mortgagee cannot himself effect a valid assignment of the premises to a purchaser. (4)

When a lease contains a covenant not to assign.

What parties must convey.

Where the deeds have been delivered for the express purpose of preparing a legal mortgage, which does not afterwards take effect, there has been much difference of opinion, whether, or not, such a deposit will of itself amount to an equitable mortgage. In one case (5) of this kind — where the deeds were delivered to an attorney to prepare a mortgage, and bankruptcy intervened before the mortgage was prepared and executed — Lord Thurlow decided that, as the deeds were not deposited expressly for securing any particular sum, the creditor had no lien on them. And Sir William Grant, in a subsequent case before him, pronounced a similar decision. (6) But Lord Kenyon determined, that such a deposit amounted in equity to a mortgage, effectual from the time of the agreement to mortgage. (7) And in a more modern case of this description, where the objection was taken, but in which none of the

As to deposit of deeds, for the purpose of preparing a legal mortgage.

(1) Ex parte *Horne*, 1 Mad. 622.

(2) Ex parte —, 2 Mad. 281.

(3) Ex parte *Baglehole*, 1 Rose, 432.

(4) *Hawkins v. Ramsbottom*, 1 Pri. 138.

(5) Ex parte *Bullock*, 2 Cox, 243.

(6) *Norris v. Wilkinson*, 12 Ves. 192.

(7) *Edge v. Worthington*, 1 Cox, 211.

Mortgages equitable.

No lien, where object of deposit not explained.

Deposit for one purpose does not give a lien for another.

Where only part of deeds deposited.

preceding cases appear to have been cited, Lord Eldon overruled the objection — saying, that the principle of equitable mortgage is, that the deposit of the deeds is evidence of the agreement to charge the estate, and that a deposit, for the express purpose of preparing the security of a legal mortgage, was stronger evidence of such agreement, than mere evidence of an implied intention. (1) And this certainly appears to be more accordant with reason and good sense, than the principle of the two preceding decisions.

But where there is no evidence to explain what was the object of the deposit, the depositary in that case has no lien on the deeds against the assignees. As where a customer left a lease with his bankers, without stating for what purpose it was left, — it was held, that the bankers had no lien on it for their general balance. (2) So, also, a deposit of deeds for a particular purpose will not give the depositary a lien upon them for any other purpose; as where deeds are deposited in order to obtain *further* credit — this will not create a lien upon them for what is due in respect of money *previously* advanced. (3)

A deposit of only *part* of the title deeds of an estate, if there is *written* evidence that the object was to create a security upon the whole estate, will render the mortgage as complete, as if all the deeds had been deposited. (4) But where a bankrupt, having agreed to execute a mortgage to *one* creditor, deposited with him all the title deeds to an estate, except the immediate conveyance to himself — and deposited that conveyance with *another* creditor as a security for his debt, promising to send him the remainder of the title deeds — but there was *no written* agreement in the case of either deposit, — the Lord Chancellor held, that neither creditor had either separately, or collectively, an equitable mortgage on the property (5); as it

(1) *Ex parte Bruce*, 1 Rose, 374.

(2) *Lucas v. Dorrien*, 7 Taunt. 398.

164. 1 Moore, 29.

(3) *Mountford v. Scott*, 1 Turn. 274. 3 Mad. 34.

(4) *Ex parte Wetherell*, 11 Ves.

(5) *Ex parte Pearce*, Buck. 525.

was not the intention that the first creditor should have a mortgage until an actual one was executed to him — and the other was not to have an equitable mortgage, until he got possession of the whole of the title deeds. Where, however, a bankrupt deposited *all* the title deeds with a creditor to secure a sum of money — and afterwards fraudulently got possession of two of them, and deposited those two with another creditor for money advanced, — the first creditor was held not to have lost his lien by so parting with the deeds, and to have a preferable claim in equity to that of the last creditor. (1) Indeed it should seem, in such a case, that the last creditor would have no lien; for it has been held, that a person, who wrongfully obtains the possession of deeds, and deposits them with another in consideration of an advance of money, confers upon the depositary no lien on them — notwithstanding the transaction was *bonâ fide* on the part of the depositary, and he had no notice of the wrongful possession of the other party. (2)

*Mortgages equitable.*

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A deposit of copies of the *Court rolls* of copyhold premises is such a deposit, as will create an equitable mortgage. (3)

Deposit of court rolls.

A deposit of deeds in the hands of a third person — who may be fairly called a third person, abstracted from both parties — may be a good equitable mortgage. But where the bankrupt had deposited deeds in the hands of his own wife on behalf of the creditor, Lord Eldon said, it would be too dangerous to hold, that the wife of the bankrupt was to be considered a depositary of his title deeds, for the benefit of any particular creditor; and that, therefore, such a claim to an equitable mortgage could not be supported. (4) And where a third person advanced money to the bankrupt, at the same time when the depositary made advances to him, and it was *verbally* agreed that the de-

Deposit with a third person, with bankrupt's wife.

When third person advances

(1) *Ex parte Meux*, *Ex parte Parker*, 2 T. R. 376. *Ex parte Canthorne*, 1 G. & J. 116. 240. *Nesbitt*, 2 Sch. & Lef. 279.

(2) *Hooper v. Ramsbottom*, (3) *Ex parte Warner*, 1 Rose, 1 Camp. 121.; and see *Hoare v.* 286.

(4) *Ex parte Coming*, 9 Ves. 115.

*Mortgages equitable.*

money, lien does not extend beyond him.

The purpose of deposit may be enlarged by a subsequent agreement.

When depositary transfers deeds to third person.

Deposit to secure an annuity.

positary was to retain the deeds, as a security for the other person as well as for himself, — Lord Eldon refused to extend the lien beyond the advance of the actual depositary; though, if the depositary had advanced nothing, then he thought it might have been evidence of his being a trustee for the other person. (1) But where deeds were deposited by a *written* agreement with bankers as a security for monies advanced, or to be advanced by them, and an alteration took place afterwards in the firm, and money transactions were had with the new firm, — it was held, that if it appeared to be the agreement or intention of the parties (notwithstanding the agreement might have been by *parol*) that the deeds originally deposited were to be held, as a security for advances by the *new* firm — that would be sufficient to give the *new* firm a lien on the deeds; for though the deposit originally was only for a particular purpose, yet that purpose might be *enlarged* by a subsequent *parol* agreement. (2)

A transfer of deeds from a depositary to a third person (who, at the request of the bankrupt, discharged the debt due from the bankrupt to the depositary) was held not to be such an assignment of them from the depositary, with reference to the time of original deposit, so as to overreach an act of bankruptcy committed before the transfer, and against the express words of a defeazance on a warrant of attorney from the bankrupt, stating that the deeds had been deposited with such third person by the bankrupt. (3)

A deposit of deeds, in order to give a party a further security for an annuity previously granted, is a valid equitable mortgage, and not within the provisions of the Annuity Act (4); such deeds, therefore, need not be registered.

(1) Ex parte *Whitbread*, 1 Rose, 299. 19 Ves. 209.

(2) Ex parte *Kensington*, 2 Ves. & B. 79. Ex parte *March*, 2 Rose, 239. Ex parte *Brown*, *ibid.* Ex

parte *Alexander*, 1 G. & J. 409. Ex parte *Lloyd*, *ibid.* 389.

(3) Ex parte *Coombe*, 1 Rose, 265. 17 Ves. 369.

(4) Ex parte *Price*, Buck. 221.

Where title deeds were deposited to secure a particular sum, and afterwards a further sum was advanced by the creditor; after which, and also after the act of bankruptcy, a memorandum was signed by the bankrupt, charging the deeds with the payment of such further sum, as well as the original sum advanced by the creditor, — it was held that, the memorandum not being hostile to the original agreement, the signature of it *after* the bankruptcy did not affect the deposit of the title deeds which took place *before*; and that the creditor was entitled to a lien for the whole amount.(1) But if a mortgage be by *deed*, a further charge by *parol* cannot be tacked to the original mortgage debt(2); for where the first mortgage is by a legal conveyance, the mortgagee is never permitted afterwards to hold the estate as further charged, not by a legal contract, but by inference from the possession of the deeds. If, however, the further charge is by *bond* — though it is obscurely worded as to the agreement between the parties — that may be so tacked.(3) And a first mortgagee is entitled to tack a subsequent judgment, docketed before the execution of the second mortgage, though no execution on the judgment had issued at the time of the bankruptcy.(4)

Whether a mortgagee, having the legal estate BEFORE the act of bankruptcy of the mortgagor, can tack a second mortgage made for further advances AFTER the act of bankruptcy, and without notice of the bankruptcy, is a point, which is still left in considerable doubt by conflicting decisions. Lord Erskine decided that he could not(5) — founding his judgment upon what fell from Lord Redesdale(6) and Lord Eldon(7) in two preceding cases. But more weight, according to Mr. Sugden, was given to those

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Difference as to *tacking*, in the case of an *equitable*, and a *legal mortgage*.

Where further charge by bond:

by judgment.

Whether a mortgagee can tack a second mortgage, *after* the act of bankruptcy, without notice.

(1) *Ex parte Langston*, 1 Rose, 26. 17 Ves. 227. *Ex parte Whitbread*, 19 Ves. 209. 1 Rose, 299. *Ex parte Hearne*, Buck. 165.

(2) *Ex parte Hooper*, 2 Rose, 323. 19 Ves. 477. 1 Mer. 7.

(3) *Ex parte Hearne*, Buck. 165.

(4) *Baker v. Harris*, 16 Ves. 397.; and see 11 Ves. 617.

(5) *Ex parte Herbert*, 13 Ves. 183.

(6) *Latouche v. Lord Dunsany*, 1 Sch. & Lef. 152.

(7) *Ex parte Knott*, 11 Ves. 609.

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dicta than he thinks they in fact deserved, — and indeed neither indicate any very strong opinion on the subject. (1) Opposed to these dicta, and to Lord Erskine's judgment, are two cases, which decide that such a mortgagee can tack a second mortgage under the above circumstances. One of these was before Lord Talbot (2), in which he held that the mortgagee, not having had notice of the bankruptcy, might make use of his prior legal estate as a protection against the commission — and in which also he took the distinction (3), that a secret act of bankruptcy did not prevent tacking, as a commission issued actually did — which was then held notice to all the world. In the other case (4) (which was first before the Lords Commissioners) the bankrupt had made a mortgage to A., — and after a commission issued against him, made another to B., who obtained an assignment of the first mortgage without notice of the commission; — and it was held by two of the Lords Commissioners against the third, that the prior mortgage did not protect the mortgage subsequent to the commission, and that the assignees might redeem, upon payment only of the money due on the first mortgage. This decision, however, appears to have been afterwards reversed on appeal to the House of Lords, when the estate was ordered to be sold, and B. to be paid the money due on the second mortgage (5); so that, according to the final decision of the case, it was considered that a mortgagee might tack a second mortgage, notwithstanding it was made subsequent to the commission, provided he had no notice (6) of the issuing of the commission. If, however, the second mortgage happen to be made more than two calendar months prior to the commission, though after the act of bankruptcy, then there is no doubt that the mortgagee would have a right to tack, under the provisions of the 81st section of the new statute.

(1) Sugd. Law V. &amp; P. 721.

(2) *Collet v. De Golls*, Forrest, 157.

63.

(3) Per Lord Eldon, 11 Ves. 615.

(4) *Hitchcock v. Sedgwick*, 2 Vern.

(5) Sugden, V. &amp; P. 721.

(6) And see *Sturges v. Brooks*, 4 B. & A. 525.



The vendor of an estate has a lien on it for the purchase money (1), on the principle that payment is an essential part of the contract; and if, upon a re-sale after the bankruptcy of the purchaser, the estate produces less, the vendor may apply the proceeds of the sale, first in liquidation of the charges of sale, and then of the purchase money, and be permitted to prove for the deficiency. (2) And though the vendor may not have conveyed the estate to the bankrupt—and consequently has both the legal and equitable title in himself—yet he may, if he chooses, apply for a sale of the premises in discharge of his lien for the unpaid purchase money, and prove for any deficiency not satisfied by the produce of the sale. (3) And where the vendor agreed to sell the bankrupt some standing trees, to be cut and taken away within a limited time, and the bankrupt cut and took away only part of them, before the bankruptcy,—the vendor was held to have a lien upon what were still growing, and to be entitled to prove for the amount of the price of those taken away. (4) But where a vendor sold timber, which was already felled and severed from the freehold, and the vendee took away part of it, and then became bankrupt,—it was considered doubtful in this case, whether the vendor had a lien upon the remainder—on the ground of the partial delivery amounting to a delivery in law of the whole; and an issue was directed on the point. (5) The vendor's lien is not discharged, by his taking bills of exchange, or any collateral security, for the amount of the purchase money—unless it can be shown, that he agreed to rest on such collateral security. (6) But where it was agreed between a mother and a son, that she should join in conveying her life-interest in an

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Lien of a vendor for the purchase money.

When lien not discharged by taking security.

(1) See the cases in Sugden, Law of V. & P. ch. 12.; and post, Ch. XI. Part 2. "Lien."

(2) *Bowles v. Rogers*, C. B. L. 123. *Ex parte Hunter*, 6 Ves. 94.

(3) *Ex parte Gyde*, 1 G. & J. 323.

(4) *Anon.* 4 Mont. B. L. Appendix, 16.

(5) *Ex parte Gwynne*, 12 Ves. 379.

(6) *Ex parte Loaring*, 2 Rose, 79.

*Grant v. Mills*, 2 Ves. & B. 306.

*Hughes v. Kearney*, 1 Sch. & Lef.

156. *Ex parte Parkes*, 1 G. & J.

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estate to a purchaser, the son undertaking in consideration thereof to secure to her an annuity—and after the execution of the conveyance, and before the annuity was secured, the son became bankrupt,—it was held, that the mother was not entitled to prove for the value of the life-estate, but only for the value of the annuity, and the arrears at the date of the bankruptcy. (1)

When mortgage fails, what proof allowed.

Where money has been advanced by a creditor to the bankrupt, either upon a mortgage, or other security, which fails in consequence of the bankruptcy intervening, proof may be always made for the amount of the money advanced, in respect of the contract implied by law, from the loan. (2) And the same where the security fails for want of a proper stamp. (3)

Applicability of security.

If a security is deposited by a bankrupt generally with his creditor, to indemnify him for a balance then due, and for such sums of money as shall be afterwards advanced—and at the time of the bankruptcy the creditor has two demands against the bankrupt, the one proveable under the commission, and the other not,—he may apply his security, in the first place, to reduce that demand which is not proveable. (4)

Where creditor insures against a contingency, and receives the sum insured.

Where a creditor had an assignment from the bankrupt of a contingent interest, to secure in part a debt exceeding the value of such interest, and the creditor insured against the contingency, and upon its taking effect received the sum insured,—it was held, that he could not prove for the whole debt; but that the sum recovered (being allowed what he had expended for effecting the insurance) must be deducted from the proof. (5)

Goods pledged cannot be

*Goods pledged* as a security for money advanced, are in the nature of a mortgage, and can only be redeemed upon

(1) *Ex parte Brockless*, Buck. 406. (4) *Ex parte Havard*, C. B. L. 124. *Ex parte Arkley*, Ibid. 126.  
 (2) *Ex parte Coming*, 9 Ves. 115. *Ex parte Hunter*, 6 Ves. 94.  
 (3) *Alves v. Hodgson*, 7 T. R. 241. *Ex parte Andrews*, 2 Rose, 410. S. C. 1 Madd. 573.  
*Ruff v. Webb*, 1 Esp. 129. *Brown v. Watts*, 1 Taunt. 353. *Wilson v. Fyear*, 4 Taunt. 288.

payment of the money, for which they are pledged. But when the person pledging becomes bankrupt, they cannot be retained (like title deeds in the case of an equitable mortgage) for *subsequent* (1) advances. And goods pledged expressly to secure a creditor, who has previously accepted and paid bills drawn on him by the bankrupt, are released from further charge, as to other bills taken up and paid subsequently, — if the amount of the *original sum*, paid on account of the bankrupt, has been repaid to the creditor, without the goods being sold. (2) A creditor having goods pledged with him in part security of his debt — if he wishes to prove for the purpose of voting in the choice of assignees; and there is not sufficient time previously to have a sale — may, on petition, obtain an order that a value shall be set upon the goods, according to the market price of the day of the choice of assignees, and prove for the difference between such value and the amount of his debt; — the creditor undertaking that, if the goods sell for more than the value so set upon them, the excess of the proceeds shall be for the general benefit of the creditors. (3) But where it appears, clearly, that the delivery of the goods is not a pledge, but amounts to an undue preference, such an order will not be made. (4) The selling of a pledge by a creditor, without applying first to the commissioners, does not (if there is no fraud in the transaction) destroy his right to prove the remainder of his debt. (5)

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retained for subsequent advances.

When creditor may have a value set upon the goods, and prove for the difference.

Selling a pledge does not prevent proof.

The agent of a bankrupt attorney may prove the amount of his whole debt, notwithstanding he retains in his hands certain securities and papers, which came into his possession as such agent, and upon which he has a lien. (6)

Agent may prove and retain papers, &c.

(1) *Vanderzee v. Willis*, 3 Bro. 21. *Adams v. Claxton*, 6 Ves. 726.; and see *Depmainbray v. Metcalf*, Prec. Cas. 416. 2 Vern. 691. *Jones v. Smith*, 2 Ves. 372.; afterwards reversed in Dom. Proc.

(2) *Erwood v. Raphael*, 5 Pri. 593.

(3) *Ex parte Greenwood*, Buck. 323.

(4) *Ex parte Smith*, 3 Bro. 46. *Ex parte Barclay*, 1 G. & J. 279.

(5) *Ex parte Geller*, 2 Madd. 262.

(6) *Ex parte Steele*, 16 Ves. 164.

## SECTION VII.

*Debts payable in futuro.*

By the 51st section of the new statute, any person who has given credit to the bankrupt upon valuable consideration for any money, which shall not have become payable when such bankrupt committed an act of bankruptcy—whether the credit is given upon any written security or not—may prove his debt, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only a rebate of interest at the rate of 5*l.* per cent., to be computed from the declaration of a dividend, up to the time such debt would have become payable, according to the terms upon which it was contracted.

This section is nearly the same as the 9th section of the 49 Geo. 3. c. 121., which was framed to remedy many inconveniences under the former Bankrupt laws. For, before that statute, if a creditor had no security for his debt in writing (1), and it was not payable till after his debtor became bankrupt—as in the case of goods sold to the bankrupt upon a certain credit—the creditor was unable to prove his debt under the commission;—a disability, which was productive of equal injustice, both to the creditor and the bankrupt. (2) But now, by the above section, all debts contracted before the act of bankruptcy, though not due till afterwards, can be proved, whether there is a written security or not, subject only to a deduction of 5*l.* per cent. discount.

## SECTION VIII.

*Contingent Debts.*

Formerly  
not prove-  
able, unless

Contingent debts were formerly not proveable under a commission, whether the contingency was certain, or un-

(1) *Ex parte E. I. Company*, 2 P. Wms. 395. *Heston v. Duperoy*, 4 East, 458.  
9 East, 498. (2) See *Pardoe v. Dearlove*.

certain, unless it had happened before the act of bankruptcy. (1) Thus, even a bill of exchange (where the contingency is certain) if not due till after the bankruptcy, could not (before the 7 Geo. 1. c. 31.) be proved (2); — any more than a debt on a policy of insurance (where the contingency is uncertain) could before the 19 Geo. 2. c. 32., unless the contingency had taken effect before the bankruptcy. And, in more recent times, a bond to secure the replacing of stock on a particular day could not be proved, unless the day had arrived, or the condition was broken before the bankruptcy. (3) Nay, even a warrant of attorney to confess judgment for an *existing debt*, being accompanied with a defeazance that judgment should not be entered up unless default was made in payment by a particular day, could not be proved, if the bankruptcy took place before that day arrived. (4) Many subtle and refined distinctions, also, were drawn between *debts accruing payable* on a contingency — and *present debts liable to be defeated* on a contingency. (5) These cases (as Mr. Eden has observed in his able exposition of the new statute (6)) will be henceforth merely matter of curiosity, in consequence of the important alteration made by the statute in the proof of this species of debts; — an alteration, that is certainly not the least valuable of the different amendments in the law of Bankruptcy, whether considered with a view to the effecting of substantial justice, or to the disentangling this species of proof from the intricacies, with which it was so long perplexed.

Contingent debts.

contingency had happened.

The following is the alteration to which allusion has been made:

By section 56 of the new act, if any bankrupt shall, before the issuing of the commission, have contracted any

But now proveable either

(1) *Ex parte E. I. Company*, 2 P. Wms. 396. *Ex parte Groome*, 1 Atk. 118. *Ex parte Barker*, 9 Ves. 110. *Hancock v. Entwistle*, 3 T.R. 435.

(2) *Callowell v. Chatterback*, cit. 2 Str. 867.

(3) *Ex parte King*, 8 Ves. 334.

(4) *Staines v. Planck*, 8 T.R. 386.

(5) *Ibid.*

(6) Page 118.

**Contingent  
debts.**

before or  
after the  
contingency.

debt payable on a contingency, which shall not have happened before the issuing of the commission, the person with whom the debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon it, and may prove the amount and receive dividends thereon; or, if the value shall not be ascertained before the contingency happens, he may then, after the contingency, prove in respect of the debt, so as not to disturb any former dividend. He is however, of course, prevented from proving, — if, when the debt was contracted, he had notice of any act of bankruptcy committed by the bankrupt.

Whether a  
guarantee  
for pay-  
ment of  
goods  
proveable,  
before cre-  
dit has  
expired.

Under this section, Mr. Eden thinks, that there is no reason now, why a guarantee for payment of goods should not be proveable against the bankrupt guaranteeing the payment, though the credit given to the purchaser be not expired (1); as well as a guarantee by the bankrupt to repay money lent to a third person, on receiving previous notice — although no notice has been given before the commission. (2) In each of these cases, the claim of the creditor against the bankrupt has certainly been held to be contingent; but, at the same time, it seems rather difficult for the commissioners to set a value on the *chance* of payment by the principal debtor — there being no rates of premium yet calculated for insurance against dishonesty, or insolvency. If, indeed, the credit had expired in the one case — or notice had been given in the other — and default made by the principal debtor — then, as a matter of course, the creditor could prove against the guarantee.

For further observations as to the proof of contingent debts, — see post: “Marriage Articles,” “Annuities,” “Bonds,” “Insurance,” “Costs,” “Damages,” “Sureties.”

(1) *Ex parte Gordon*, 15 Ves. 386.

(2) *Ex parte Minet*, 14 Ves. 189.; and see *Utterson v. Vernon*, 3 T. R. 559, 4 T. R. 570.

## SECTION IX.

*Creditors by Marriage Articles.*

The Courts were formerly much hampered in the relief, which they were able to afford the Bankrupt's wife and children, under any settlement or bond made by him for their benefit at the time of his marriage. For, as no contingent debt could, as we have just seen, be proved, unless the contingency took place before the bankruptcy—and a provision of this kind is, from its very nature, generally uncertain and contingent, by reason of the different limitations as to death and survivorship—the wife and family of a bankrupt were often (under the old law) entirely defeated of the provision intended to be secured to them,—Lord Hardwicke observing, even in his time, that the different acts then existing had not made a sufficient provision for the relief of such sort of creditors. (1) Thus, although the husband, by marriage articles or bond, covenanted with trustees to leave his wife a certain sum, “*in case she survived him*”—or to pay to trustees a certain sum, “*in case she died, leaving children who should attain the age of 21*”—and the wife happened to be living at the time of the bankruptcy,—it was held, that the trustees could in neither case prove the amount under the commission. (2) And so, indeed, in every other case where the bankrupt had contracted to pay money on a contingency, which had not happened previous to the bankruptcy, and which might, or might not, happen afterwards. In some cases, however, where the contingency *had* happened after the bankruptcy, and before any distribution had been made of the bankrupt's

Former in-  
conveni-  
encies  
from dis-  
ability of  
proof.

(1) *Ex parte Groome*, 1 Atk. 117.  
120.

(2) *Ibid.* *Ex parte Caswell*, 3 P.  
Wms. 497. *Ex parte Barker*, 9 Ves.  
110. *Tully v. Sparkes*, Ld. Raym.  
1546. Str. 867. *Ex parte Jaf-  
fier*, 7 Vin. 72. *Ex parte King*,

*Davies*, 254. *Studdy v. Tingcombe*,  
3 Ves. 695. *Ex parte Murphy*,  
1 Sch. & Lef. 44. *Ex parte Mara*,  
8 Ves. 335. *Ex parte Alcock*, 1 V.  
& B. 176. 1 Rose, 325. *Brandon  
v. Brandon*, 2 Swanst. 327.

**Marriage  
articles.**

effects, the Court frequently, from the extreme hardship of the case, and more especially when the wife had brought a portion to her husband, would recommend the creditors to make some provision for her, — which was in general attended to. (1) And when the assignees were obliged to come into a court of equity, to compel the performance of a trust, the Court would then, as they required equity, make them do equity, by securing the intended settlement to the wife. Where, however, the contingency was *certain*, — then, though it had not happened before the bankruptcy, the debt could, nevertheless, be proved under the 7 Geo. 1. c. 81., being *debitum in presenti solvendum in futuro* — as in the case of a bond payable at the death of the obligor, or upon any other event which was sure to happen within a reasonable time. (2)

Creditors  
may now  
prove  
under the  
clause re-  
lating to  
contingent  
debts.

But now, in all these cases, where the bankrupt binds himself to pay a sum upon a contingency, the trustees of parties interested may, under the 56th section of the new statute (3) already mentioned, apply to the commissioners to set a value on their contingent interest, such as it may be, and prove the amount under the commission; — or they may wait till the contingency happens — if they think that the more advantageous course — and then prove for the whole sum that has become payable.

When co-  
venant  
broken  
before  
bank-  
ruptcy,  
debt al-  
ways  
proveable;

Where, however, the bond or covenant to secure a marriage portion was forfeited or broken before the bankruptcy, it could always, in such a case, be proved under the commission; for, by the breach of the condition, the penalty or sum covenanted to be paid becomes then a legal debt. (4) And though the arrears of interest, in the payment of which default is made, are accepted after the forfeiture, it is not such a waiver of the forfeiture as to prevent

(1) Ex parte *Greenway*, 1 Atk. 118. Ex parte *Mitchell*, ibid. 120. Ex parte *Groome*, ibid. 118. *Holland v. Calliford*, 2 Vern. 661.

(2) Ex parte *Milford*, 1 Bro. 398.

(3) See ante, 213.

(4) Ex parte *Winchester*, Davies, 530. 1 Atk. 116. Ex parte *Elder*, 2 Madd. 282. Ex parte *Rowlatt*, 2 Rose, 416. Ex parte *Dicken*, Buck. 115.



the proof (1) In every case, also, where there was a remedy at law against the bankrupt before the bankruptcy upon the obligation he had entered into, the debt might always be proved under the commission (2); as where he entered into a bond or covenant to pay or invest money *forthwith*, or *as speedily as possible*, without any step being taken by the other party.

But there are still some cases where a contingent provision in a marriage settlement cannot be proved under a commission; — as where a provision of this kind is made of the husband's property, and is expressly contrived for the purpose of avoiding the operation of the Bankrupt laws. Thus, if a bond be given by a trader upon his marriage to trustees, to be forfeited upon the contingency of his becoming insolvent, or a bankrupt, such a bond cannot be proved, — on the principle, that it would be defeating the effect of the Bankrupt law, and would be a fraud against the rest of the creditors. (3) So a settlement by the husband (though not in trade at the time, or intending then to trade) of freehold and leasehold estates, to the use of himself for life, unless he should embark in trade and in the life of his wife become bankrupt — and from his decease or bankruptcy, then to secure an annuity to his wife — was, upon his afterwards engaging in trade and becoming bankrupt, held void as against his (4) creditors.

If, however, the wife brings a portion to the husband, then her fortune, or a proportionable part of the husband's property, may be settled upon the husband until his bankruptcy, and then to her separate use, or to the use of the

*Marriage articles.*

and so when any remedy at law against the bankrupt.

Where settlement of the husband's property, made to avoid the operation of the Bankrupt law, debt not proveable.

Contrd where the wife brings a portion to the husband.

(1) 1 Atk. 118.

(2) Ex parte *Smith*, C. B. L. 212. Ex parte *Granger*, 10 Ves. 349.

(3) Ex parte *Hill*, C. B. C. 228. Ex parte *Matthews*, *ibid.* Ex parte *Bennet*, *ibid.* 929. Ex parte *Cooke*, 8 Ves. 555. Ex parte *Henney*, 1 Sch. & Lef. 46. Ex parte *Osley*, 1 Ball. & B. 257. *Wise's Case*, Cal. temp. King, 46. Ex parte *Mur-*

*phy*, 1 Sch. & Lef. 44. In the three first of these cases, the reasons for the judgment of the Court are not noticed by Mr. Cooke; it is uncertain, therefore, whether it proceeded on the ground of the contingency, or the fraud; most probably, however, on both grounds.

(4) *Higinbotham v. Holme*, 19 Ves. 88.

Marriage  
articles.

children of the marriage; and if, in such a case, any part of the wife's fortune has been lent to her husband, the debt may be proved (1) under a commission against him. As, where in articles for the settlement of 10,000*l.* (which was only part of the wife's fortune) upon the husband till his bankruptcy, he covenanted to give a bond for 5000*l.* upon the same trusts — and then received all his wife's fortune, without making any settlement of his property on her, — proof was admitted under his bankruptcy, not only for the 10,000*l.*, but also for the 5000*l.*, or for so much thereof as the value of the wife's property received by the husband would extend to, beyond the sum of 10,000*l.* (2) So, where a trader, in consideration of his wife's fortune, conveyed his house to trustees, to his own use till death or bankruptcy — and then, in either event, in trust to raise 1000*l.* for her separate use, — it was held to be a fair and valid settlement (in the nature of a mortgage) to secure the wife's fortune. (3) In one case, also, where the *intention* of the parties was, that a bond by the husband to trustees for his wife's fortune should be proveable in the event of his bankruptcy — and it appeared that, through some mistake, it was omitted to be so provided in the marriage settlement, — the bond was permitted to be proved under the commission. (4)

But proof  
limited  
to the  
amount  
of her  
fortune.

But in every case, where a settlement is made in consideration of the *wife's fortune*, the proof of the trustees will be limited to the *amount* of what the husband has actually received of her fortune. (5) For, where a trader on his marriage received a portion of 600*l.* with his wife, and in consideration thereof and of the marriage gave a bond for 1000*l.* to a trustee payable in six months, the interest to himself for life if he should continue solvent — but, in case of

(1) *Lockyer v. Savage*, 2 Str. 947. Ex parte *Broune*, C. B. L. & B. 252.  
 215. *Stretton v. Hale*, 2 Bro. 490.  
 Ex parte *Hinton*, 14 Ves. 598.  
 (2) Ex parte *Cooke*, 8 Ves. 353.  
 (3) *Higginson v. Kelly*, 1 Ball. & B. 252.  
 (4) Ex parte *Verner*, *ibid.* 260.  
 (5) Ex parte *Young*, Buck. 179.  
 3 Madd. 124.

his death or insolvency, the interest to his wife for her life, and the principal among the children of the marriage, — *Marriage articles.*  
 Lord Redesdale only allowed proof to be made for the 600*l.*, and refused to permit the remaining 400*l.* to be proved, that being the property of the husband, and the settlement of it therefore fraudulent, according to the authority of all the cases. (1) So, where by settlement previous to the marriage of the bankrupt, 6000*l.* stock (half of which was the fortune of the wife) was assigned to trustees, in trust to pay the dividends to the bankrupt for life, or until he should become bankrupt — and after his death or bankruptcy, then to pay the same to the wife; and the trustees were thereby directed also to stand possessed of a bond for 2000*l.* (given by the bankrupt to the trustees) in trust, if there should be no issue of the marriage after the death of the bankrupt, to pay the interest thereof to the wife for life, *by way of increase* to the provision before made for her — and in case of issue living at the death of the bankrupt, the bond was to be delivered up to be cancelled; and the wife was living at the time of the bankruptcy, and there was no issue; — Lord Eldon, under these circumstances, held that the bond was not proveable under the commission. (2) And in another case, where the husband covenanted, in consideration of certain contingent interests of the wife being conveyed to him, that his executors should, six months after his death, pay 5000*l.* to trustees, — it was held, that they could only prove to the amount of what the husband's contingent interest in the wife's property sold for under his bankruptcy. (3)

In some cases, the trustees will not be permitted to prove for the whole amount even of the wife's property, whether received by the husband or not, if any part of such *Or to such part only, as is included in*

(1) In re *Meaghan*, 1 Sch. & Lef. 179.

(5) Ex parte *Young*, 3 Madd. 124. Buck. 179.

(2) Ex parte *Thafe*, 1 G. & J. 110.

*Marriage articles.*

the settlement.

Where the bankrupt makes a *false representation* of his property at the time of the marriage,

trustees may prove for sum covenanted to be settled.

property does not come within the terms of the settlement. Thus, where the husband gave a bond to a trustee to enable him, in case of bankruptcy, to come in as a creditor, as well for the sum of 500*l.*, as for so much beyond that sum as could be ascertained to be the distributive share of the wife in *her father's property*, — and the wife was entitled (besides this 500*l.*) to a legacy of 80*l.* under the will of *her brother*, which was received by the husband, — Lord Eldon allowed the trustee only to prove for the 500*l.*, and ordered the claim for the 80*l.* to be struck out. (1)

Where the husband makes a *false representation* at the time of his marriage of the amount of his *own property*, and covenants with trustees to settle estates or money upon his wife, which he is not entitled to or does not possess, and the marriage takes effect upon the faith of such representation, — then the trustees, in order that the wife may not be left wholly destitute by such a fraud, will be permitted to prove for the amount of the sum which was so covenanted to be settled. As where, by a settlement made before marriage, it was recited that the intended husband had 1000*l.* and upwards employed in his trade, and it was agreed that 500*l.* part thereof should be vested in trustees, upon trust for the separate use of the wife for life, and after her death, then for the husband and the children of the marriage — and it appeared, that the representation in the settlement was unfounded — that the money was never paid — and the husband became a bankrupt, and died, leaving his widow surviving, but no children; — upon a petition by the trustees to prove for the 500*l.*, Lord Eldon said, that on the authority of the case of *Montefiori v. Montefiori* (2), and many others, the husband was bound to make good the representation in his marriage settlement; and he made an order, permitting the trustees to prove, and directing it to be recited in the order, that it appeared that the representation in the marriage settlement was *false* at the time

(1) *Ex parte Hodgson*, 19 Ves. 206.

(2) 1 Bl. 363.

it was made, and that the marriage was not upon the faith of that representation. — See where by settlement previous to the marriage the husband conveyed in consideration of the marriage, or transfer immediately afterwards, or whenever requested by the trustees 2000*l.* stock which was falsely alleged to be standing in his name into the names of the trustees, upon the trusts of the settlement; and the trustees frequently after the marriage requested the husband to transfer the stock, which he repeatedly promised to do, but never did, and became bankrupt, — the trustees were in this case permitted to prove the value of the 2000*l.* stock, upon filing a previous affidavit as to the time at which the request was made — with reference to the then price of stock, which the commissioners were directed to ascertain. (2)

Whenever the bond, or covenant, is for the investment of money or transfer of stock, upon request, the specific time of the request should be correctly ascertained; for the amount of the proof will be regulated, by the price of the stock at the time the request was made. (3) If the request has not been made before the bankruptcy, the amount of proof will then, perhaps, depend upon the price of the stock on the day of commission. (4)

And in all these cases — whether the sum permitted to be proved is the original property either of the husband, or of the wife — if the husband is entitled to the interest for life, or to a subsequent contingent interest, the Court will order the dividends on the sum proved to accumulate as a fund, the interest of which fund the assignees will be permitted to receive, if the bankrupt is entitled to a life-interest in the property — the fund itself being kept together, to await any future contingency declared by the marriage settlement. When that contingency takes place, it will then either be applied to the purposes of the trust, or be distributed.

When proof regulated by the price of stock.

When husband entitled to a life-interest in the property, dividends to accumulate.

(1) *Ex parte Gardner*, 11 Ves. 40.

(3) *Ibid.* *Ex parte Mace*, 8 Ves.

(2) *Ex parte Campbell*, 16 Ves. 335.

(4) *Ex parte Day*, 7 Ves. 305.  
*Ex parte Leigh*, 1 Mont. Dig. 229.

Marriage  
articles.

buted amongst the creditors of the bankrupt, as the circumstances of the case may be. (1)

### SECTION X.

#### *Creditors of a Bankrupt Executor, or Trustee, and herein of the Executors of a Creditor.*

Trust property not affected by the bankruptcy.

Where an executor or trustee becomes bankrupt — as he acts in *auter droit*, his bankruptcy does not take away his rights as executor, or trustee; and whatever property he may possess in either capacity, which can be distinguished from his own, is not affected by the assignment of the commissioners (2)—the assignees being bound to account for it, and deliver it up to the persons who are really entitled to it. And in such a case, it is specially provided by the new statute (3), that where the bankrupt has any *stock* standing in his name as trustee, either alone or jointly, the Lord Chancellor may order the stock to be transferred to such person as he shall think fit, upon the same trusts as it was subject to before the bankruptcy.

Stock may be transferred to a new trustee.

When proof must be made.

But where the testator's property cannot be distinguished from the general mass of property in the possession of the bankrupt, or when the bankrupt has been guilty of a breach of trust in applying trust property to his own use, proof must then be made for the amount due to the testator's estate, in such manner as shall be directed by the Lord Chancellor. Until lately the commissioners in such a case frequently admitted the bankrupt to prove against his own estate, without obtaining previously any order of the Chancellor; but as this proceeding introduces into his character the double and inconsistent relation of debtor and creditor—and as the commissioners have no power, like the Chancellor, to annex a condition to the proof, that

Bankrupt not allowed to prove against his own estate, without an order.

(1) *Holland v. Calliford*, 2 Vern. 662. *Ex parte Groome*, 1 Atk. 117. *Ex parte Smith*, C. B. L. 212. *Ex parte Mitford*, 1 Bro. 398. *Stratton v. Hale*, 2 Bro. 489.

(2) *Bennet v. Davies*, 2 P. Wms. 318. *Rex v. Egginton*, 1 T. R. 370. *Howard v. Jemmett*, 3 Burr. 1369. *Ex parte Ellis*, 1 Atk. 101. *Ex parte Llewellyn*, 1 C. B. L. 137.

(3) Section 77.

the funds shall not come into the hands of the bankrupt,— Lord Eldon, upon a recent (1) occasion, very strongly discountenanced proof being admitted under these circumstances, on the mere authority of the commissioners. And, in a subsequent case, where the bankrupt, who was executor of one of his creditors, proved the debt under his own commission, without previously obtaining the order of the Lord Chancellor, and upon that proof signed and carried his certificate,—Lord Eldon ordered the proof to be expunged, and sent the certificate back to the commissioners. (2) It is therefore now settled, that a bankrupt executor is not entitled to prove under his own commission, without the special order of the Court. And the Court, moreover, will not make such an order, except in a case perfectly harmless—nor without special directions that the dividends shall not be received by the bankrupt. (3)

*Executors  
and trustees.*  
—

Where the bankrupt has been guilty of a breach of trust, or has committed a *devastavit*, the Court will not permit him to prove at all, but will order one of the legatees, or other persons interested in the property of the testator, to prove on behalf of himself and the other parties interested. (4) Thus where two executors sold out trust money in the funds, for the benefit of one of them who died insolvent, and the survivor afterwards became bankrupt,—it was held, that the person interested in the trust fund might prove against the estate of the bankrupt the amount of the stock sold out, according to its value at the time of the bankruptcy. The funds in this case had risen considerably, between the time of sale and the date of the commission; and the order was made with reference to the rule in equity, that where a trustee has made use of the trust fund, he may be compelled by the *cestui que trust*,

Where bankrupt has committed a breach of trust, not permitted to prove;

but a legatee,

(1) Ex parte *Shaw*, 1 G. & J. 127. where there is a luminous judgment of Lord Eldon's upon this, and other points.

(3) Per Lord Eldon, 1 G. & J. 161.

(4) Ex parte *Shakerhaft*, 3 Bro. 197. Ex parte *Fairchild*, 1 G. & J. 221.

(2) Ex parte *Marshall*, 1 G. &

**Executors  
and trust-  
tees.**

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or a cre-  
ditor.

Where  
one trust-  
tee lends  
trust mo-  
ney to the  
other.

*Cestui que  
trust*  
should join  
in proof.

As to ap-  
pointment  
of receiver.

How di-  
vidends  
ordered to  
be paid.

either to replace the fund—or to account for what he made of it—as it should appear most for the benefit of the *cestui que trust*. (1) And it seems, that such an order for proof may be obtained in the first instance, without a previous application (2) to the commissioners. In one case, where the property was small, a creditor of the testator was permitted to prove for the amount of such part of the testator's property, as had come to the bankrupt's hands. (3)

Where a sum was paid to one trustee on account of the trust fund, and he lent it to the other trustee upon note, and both became bankrupt,—proof was permitted to be made for the amount under each commission. (4)

Where a trustee himself proves under a commission, the *cestui que trust* should join in the proof; but if there is any difficulty in obtaining the attendance of the latter, then an order may be obtained for the trustee to prove alone. (5)

In some cases a receiver has been appointed, *on petition*, to prove what is due, and to receive the dividends on the proof. (6) But where the testator's property is considerable, or it is necessary to take an account of the assets, Lord Thurlow held, that the creditors of the testator must proceed *by bill* (7); and it has also more recently been decided by Lord Eldon, that a receiver can only be appointed *by bill*. (8) In these cases the Lord Chancellor generally directs, for the security of the parties interested, that the dividends shall be paid into the Bank by the assignees, subject to further orders. (9) But where a *cestui que trust* is entitled absolutely to any share in the trust property, and has attained twenty-one, the assignees

(1) *Ex parte Shakeshaft*, 3 Bro. 197. *Ex parte Fairchild*, 1 G. & J. 221.

(2) *Ex parte Moody*. *Ex parte Preston*, 2 Rose, 413.

(3) *Ex parte Leake*, 2 Bro. 596.

(4) *Keble v. Thompson*, 3 Bro. 112.

(5) *Ex parte Dubois*, 1 Cox, 310. *Beardmore v. Cruttenden*, C. B. L. 211. Green, 149.

(6) *Ex parte Ellis*, 1 Atk. 101. *Ex parte Llewellyn*, 1 C. B. L. 157.

(7) *Ex parte Leake*, *supra*.

(8) *Ex parte Tupper*, 1 Rose, 179.; and see *ex parte Markland*, 2 P. Wms. 546. *Ex parte Whitfield*, 2 Atk. 315.

(9) *Ex parte Leake*, *supra*. *Ex parte Brookes*, C. B. L. 138. *Ex parte Shakeshaft*. *Ex parte Moody*. *Ex parte Fairchild*, *supra*, 1 G. & J. 157.



as directed, will be ordered to pay to him at once the dividends payable upon his proof. (1)

Executors  
and trus-  
tees.

If a legacy be given to a legatee, payable at twenty-one, or marriage, with interest — it is a vested legacy, and the legatee may prove it under a commission against the executor; — or, if he has not attained twenty-one, or been married, his guardian, upon petition, will then be permitted to prove it. (2) And where five children of a bankrupt had vested interests under a will (of which the bankrupt was executor) in certain trust funds after the death of their mother, subject to a power of appointment to be exercised by their father and mother, or the survivor of them, and the bankrupt had converted the trust property to his own use, — it was held, that as no appointment had been made, each of the five children was entitled to prove one fifth part of the trust funds against the estate of the bankrupt, notwithstanding their father (who was the bankrupt) and their mother were both still alive. (3)

A vested  
legacy  
proveable  
by the le-  
gatee, or  
his guar-  
dian.

Where an executor, who was directed to carry on his testator's partnership trade, exceeded his authority, by employing the assets in the trade to an extent not warranted by the will — and the surviving partner and the executor became bankrupt — the bankrupt executor in this case was allowed to prove the excess of the assets so employed under a joint commission, against him and the surviving partner. (4) But if an executor, who is directed to carry on his testator's trade, do not go beyond his authority, then the assets employed by him in the trade can never be proved under the commission; for they are in this case a part of the capital of the trade to pay its debts; but this is not the case, where he commits a breach of trust, by using the assets to an extent not authorized by the will. (5)

Where an  
executor  
exceeds his  
authority  
in the em-  
ployment  
of the  
assets in  
trade,  
excess  
may be  
proved.  
Contra,  
when he  
does not  
exceed his  
authority.

If the bankrupt, besides being executor, is beneficially

Where  
executor

(1) *Ex parte Kettlewell*, 1 G. & J. 723.

(2) *Walcott v. Hall*, 2 Bro. 305.

(3) *Ex parte Biddys*, 1 G. & J. 167.

(4) *Ex parte Richardson*, Buck. 203. 421. *Ex parte Garland*, 10 Ves. 110. *Contra Hankey v. Hammon*, *ibid.* 210.

(5) *Ibid.* 209.

*Executors and trustees.*

is also beneficially entitled, and commits a *devastavit*.

Where an executrix marries a bankrupt.

Costs not proveable, where executor pleads a false plea.

Where the creditor of a bankrupt dies, his executor may prove.

Where the bankrupt a co-executor of the creditor, then the other executor ordered to prove.

entitled to any part of the testator's property — his interest, of course, passes to the assignees; and the Lord Chancellor will, if necessary, let the assignees sue in the bankrupt's name, in order to get in the effects. (1) And though the executor had committed a *devastavit*, who was entitled in his own right to a specific legacy, which was sold by his assignees, — it was held, that the produce of such sale in their hands was not liable to make good the *devastavit*; but that the parties beneficially entitled must prove to the amount of the *devastavit*. (2)

If an executrix marries, and her husband becomes bankrupt, having previously admitted assets, in answer to a bill filed against them, — the assets in this case become a debt of the husband, and may be proved under his commission. (3)

Costs of suit incurred by a bankrupt executor in an action (brought against him after the issuing of the commission) in which he pleads a false plea, are not proveable under the commission. (4)

If the creditor of the bankrupt is dead, the proper person to prove is, of course, the creditor's executor or administrator. And where a debt was forgiven the bankrupt by a testator, upon condition that the bankrupt should pay an annuity to his sister, but if he failed in doing so, the executrix was to call in the whole debt — and default was made by the bankrupt in the payment of the annuity — the executrix was permitted in this case to prove the debt. (5)

Where the bankrupt, and another person who was solvent, were executors of the creditor, Lord Thurlow permitted the solvent executor to prove the debt under the commission, notwithstanding a pending suit in the ecclesiastical court as to the executorship: but the dividends were ordered to be paid into the Bank, pending the contest in the ecclesiastical court. (6)

(1) Ex parte *Butler*, Amb. 74.  
*Bedford v. Woodham*, 4 Ves. 40.

(2) *Geary v. Beaumont*, 3 Meriv. 431.

(3) 1 Sch. & Lef. 173.

(4) *Howard v. Jemmet*, 3 Burr. 1368.

(5) Ex parte *English*, 2 Bro. 609.; and see ex parte *Bridges*, 4 Madd. 269. ante.

(6) Ex parte *John Shakeshaft*, 3 Bro. 198.

bankrupt with monies in his hands, is entitled to any dividends on the estate of which he was trustee, if no reimbursement is made to the last trustee of the money, which he had in his hands at the time of the bankruptcy. (1)

*Executors and trustees.*

Where an assignee becomes bankrupt.

## SECTION XI.

### *Creditors by Annuities.*

Original cases in Bankruptcy, as to the proof of annuity bonds forfeited before the bankruptcy of the debtor of the annuity, considered the penalty of the bond as the debt — not indeed as wholly receivable by the obligee, but to stand as a security for the payment of the annuity; — and Lord Hardwicke's first rule was, if there were sufficient assets, merely to order the annuity to be paid half yearly, down to the death of the annuitant. But this mode of proceeding was afterwards altered (2) by him, for the better convenience of distribution. For, if the annuity was to be received from time to time as an accruing debt on the estate, that would tend to make the division of the estate perpetual; and there could, at all events, be no final division during the annuitant's life. To avoid, therefore, this inconvenience — and in order to attain a dividend at a certain time, the Courts afterwards allowed a value to be set on the annuity (3), and the annuitant to come in as a creditor for that value under the commission. There was also a distinction made before the 49 G. 3. c. 121. s. 17. (which was the first act that authorised direct proof of annuities *eo nomine*) between a *covenant*, and a *bond*, for the payment of an annuity: in the first case the arrears only of the annuity could be proved — in the last, if the

Former practice as to proof.

49 G. 3.  
c. 121.  
s. 17.

(1) *Ex parte Bignold*, 2 Mad. 470.

(3) *Ex parte Artis*, 2 Ves. 489.

(2) Per Lord Eldon, 19 Ves. 245. *Cottrell v. Hooke*, Doug. 97.

Annuities.

bond was forfeited *before* the bankruptcy, then the value of the annuity, as well as the arrears, was proveable. (1) And this rule of setting a value on the annuity was confined to cases, where the annuity was secured by some instrument with a penalty, which had become forfeited BEFORE the bankruptcy of the grantor, by his permitting the annuity to become in arrear and unpaid. (2) For where there were no arrears due at the time of the bankruptcy, it was considered in some cases, that there was no debt then due at law, but a mere contingency as to the penalty becoming a debt *in futuro*, by the subsequent non-payment of the annuity. (3) If a forfeiture, however, had once happened, the receiving payment afterwards of the arrears was held not to be such a waiver of the forfeiture, as to take the case out of the general rule. (4)

Provision  
of the new  
statute.

The new statute adopts a similar provision for the proof of annuities, as was introduced by the 49 G. 3. c. 121. s. 17., with additional directions as to the mode of calculating the value. Thus, by *sect. 54.* it is enacted, that by whatever assurance the annuity is secured, and whether there are, or are not, any arrears due at the time of the bankruptcy, the annuity creditor may prove for the value of the annuity; which value the commissioners are to ascertain, with regard to the original price given for the annuity, deducting therefrom such diminution in the value, as shall have been caused by the lapse of time, since the grant of the annuity to the date of the commission.

Mode of  
ascertain-  
ing the  
value.

This mode of ascertaining the value is consistent with the rule laid down previously by Lord Eldon, — who held,

(1) *Ex parte Thistlewood*, Doug. 249.

(2) *Ex parte Le Compte*, 1 Atk. 251. *Ex parte Bolton*, Ibid. *Ex parte Burrow*, 1 Bro. 268. *Ex parte Rowlatt*, 2 Rose, 416.; and see *Cullen*, 92.

(3) *Perkins v. Kempland*, 2 Bl. 1106.; but see *Pattison v. Bankes*, Cowp. 540., where there was no forfeiture before the bankruptcy,

and yet the bond was held proveable under the 7 G. 1. c. 31., as being for a debt payable at a future day. See also *Brooks v. Lloyd*, 1 T.R. 17., which was the case of a bond payable by instalments, and which was held proveable for the same reason, though there was no default before the bankruptcy.

(4) *Wyllie v. Wilkes*, Doug. 519 2 Bl. 1108.

that if there were not any special circumstances, the commissioners should ascertain the value upon the basis of the original sum paid, qualified by the time of enjoyment. (1) And the state of the money market is not a circumstance, which can affect this rule. (2) Under some circumstances however, the rule, if strictly followed, might be productive of injustice. As, where a person in a bad state of health (which is known to the grantor) purchases an annuity of him for a sum less than the usual market price, and soon afterwards recovers, whereby the value of the annuity is, of course, considerably improved; — in this case, as the probability was (when the annuity was granted) that the purchase would turn out to the disadvantage of the annuitant, it seems but just, that he should be allowed the benefit of his restoration to health having operated in his favour. (3) And, indeed, in such a case before the new statute, Lord Eldon permitted proof to be made, upon a calculation with reference to the age and improved health of the annuitant, notwithstanding the value so ascertained exceeded the price originally given for the annuity, and the grantee had enjoyed the annuity for the space of two years. (4) Sir J. Leach, however, in a recent case decided, that the commissioners are now precluded by the 54th section of the new statute, from taking into consideration the altered state of the health of the annuitant; and that where the consideration for the annuity is not money, but property, the price paid by the grantee for that property is not the criterion of value, if such value be altered by accidental circumstances. (5) In a case of a peculiar kind which came before Lord Thurlow, he permitted the whole penalty of an annuity bond to be proved, without regard to the time of enjoyment, and without any deduction of the payment of the annuity. (6)

*Annuities.*

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Where an annuity creditor applied to prove, and was

Where annuity

(1) *Ex parte Whithead*, 19 Ves. 557. 2 Rose, 358. 1 Meriv. 10. 290. 19 Ves. 236.

127.; and see 1 Atk. 251.

(4) *Ibid.*

(2) *Ex parte Webb*, 2 G. & J. 29.

(5) *Ex parte Fisher*, 2 G. & J. 102.

(6) *Ex parte English*, 2 Bro. 609.

**Annuities.**

void  
under the  
annuity  
act, gran-  
tee may  
prove ba-  
lance of  
original  
consider-  
ation.

refused, on the old principle, that the bond was not then forfeited — but it appeared afterwards that the bond was in reality void under the provisions of the annuity act (1) — and he then petitioned to prove for the sum actually advanced — Lord Loughborough dismissed the petition, saying, that as he had insisted on his security at the date of the commission, it was not the same debt. (2) But in a similar case before Lord Eldon, where the creditor had not insisted on his security, the grantee was permitted to prove the balance remaining due of the money advanced. (3)

Where  
consider-  
ation not  
proveable.

Where B. purchased an annuity of C. through the agency of the bankrupts, and the consideration money was received by them, as agents for C., and placed to C.'s account, — it was held, that B. could not prove the consideration paid, unless the grant of the annuity was merely colourable, and contrived by the bankrupt for the purpose of obtaining B.'s money for their own use. (4)

A deposit of deeds, as a further security for an annuity previously granted, we have seen (5), is not within the provisions of the annuity act, — and such deeds, therefore, need not be registered.

Where  
annuities  
granted by  
bankrupt  
for inade-  
quate con-  
sideration.

Where it appears that annuities have been granted by the bankrupt for an inadequate consideration — such as having been bought at only five years' purchase for a good life — though the assignees may not object to the proof, yet a special meeting of the creditors should be called to decide, whether the assignees should consent or not to admit such proof. (6)

Annuity  
creditors  
now upon  
the same  
footing as  
other  
creditors.

Annuity creditors are not *compelled*, any more than any other creditor, to come in under the commission, but may sue the bankrupt if they choose, and decline to prove. But they cannot sue any surety for the annuity without proving; nor can they now proceed against the bankrupt (as they could formerly under a deed of covenant for securing (7) the annuity) after he has obtained his certifi-

(1) 17 G. 3. c. 26.

(2) *Ex parte James*, 5 Ves. 708.

(3) *Ex parte Wright*, 19 Ves. 255.;  
and see *Shove v. Webb*, 1 T. R. 732.  
*Walker v. Liscarry*, 6 Esp. 98. *Ex*  
*parte Brockliss*, Buck. 406.

(4) *Ex parte Shaw*, 2 G. & J. 106.

(5) *Ante*, 206.

(6) *Ex parte Cator*, 1 Bro. 267.

(7) *Fletcher v. Bathurst*, 7 Vin.  
71. pl. 4. 4 Burr. 2446. *Cottrell v.*  
*Hooke*, Doug. 93.

cate; for, by the present act, the certificate is made a discharge from all claims, either of the annuitant or the surety, in respect of the annuity. (1)

Where the annuity is secured on freehold or leasehold property, which is insufficient to satisfy the arrears due, as well as the value of the annuity, an order will be made for the sale of the property on which the annuity is charged; and the grantee will afterwards be allowed to prove for the residue. (2)

A mere stipulation for the payment of annual interest, for the forbearance of a sum of money, cannot be proved as an annuity; for it is not an annuity in any reasonable sense of the term — neither does it come within the meaning of the statute. An ANNUITY implies, that the principal sum is gone for ever, and is to be satisfied by yearly periodical payments. (3)

It has been stated, that arrears of an annuity subsequent to the commission are not the subject of proof (4); but no authority is cited for this position, which, indeed, does not appear very reasonable in itself. For, as the creditor, in proving for the entire value of the annuity, proves in fact for the *probable*, though at the same time the uncertain, amount of all *future payments* — which payments would, of course, when they fell due, become of themselves *arrears subsequent to the commission* — it is somewhat inconsistent to shut him out from proof of arrears which are actually due, and in regard to which there can be, therefore, no uncertainty as to the amount.

The new statute provides, also, for the relief of the surety for the payment of an annuity by the bankrupt, (which the 49 G. 3. c. 121. was deficient in) as well as for the relief of the bankrupt himself from the contingent claims of the surety. For by *section 55.* (besides declaring

*Annuities.*

Where annuity charged on lands.

An engagement to pay annual interest cannot be proved as an annuity.

Provision as to sureties.

(1) *Section 55.*; and see also *Section 121.*

(2) *Ex parte Key*, 1 Madd. 426. *Ex parte Slack*, 1 G. & J. 346.

(3) *Winter v. Mousley*, 2 B. & A. 806, 807.

(4) 1 G. & J. 346., note (a). *Eden's B. L.* 115.

**Annuities.**

when discharged;

when may stand in the place of the annuitant in respect of his proof.

When annuity creditor comes upon the surety for any deficiency after bankrupt has got his certificate, quære, whether bankrupt discharged as to the surety.

it to be unlawful for any person entitled to an annuity granted by the bankrupt to sue any person, who may be a collateral surety for the payment of the annuity, until the annuitant shall have proved under the commission for the value of the annuity) it is enacted, that if the surety, after such proof, shall pay the amount so proved, he is discharged from all claims in respect of the annuity; and he is only liable to be sued for the accruing payments, in the event of his failing to pay the sum proved, before any payment of the annuity subsequent to the bankruptcy becomes due; — nor is he then liable to pay beyond the amount so proved, with interest at 4 per cent. from the time of his receiving notice of such proof, and of the amount thereof. And after such payment or satisfaction by the surety, he may then stand in the place of the annuitant, in respect of the proof, to the amount of the sum so paid or satisfied; and the certificate of the bankrupt is then declared to be a discharge from all claims of the surety, as well as of the annuitant, in respect of the annuity. The surety is also entitled to credit in account with the annuitant, for any dividend which the latter may have received, before he can be called upon to pay the whole sum proved by the annuitant under the commission.

It may still, however, be a doubtful point, when the annuity creditor, after proving the value of the annuity, and receiving all the dividends he can receive upon such proof, comes upon the surety for the deficiency after the bankrupt has obtained his certificate, — whether, in such a case, the certificate would discharge the bankrupt from the claims of the surety. For, if the annuity creditor chooses to avail himself to the extent of his proof, without giving any notice to the surety, or making any claim against him until after a final dividend is declared, the surety would have no opportunity of proving under the commission. It might, indeed, be held, that in order to acquit himself, as against the annuity creditor, and to entitle himself to any claim against the bankrupt, he is bound to take immediate



notice of the annuitant's proof, and to pay the amount so proved; for, by the above section, the annuitant is not compelled to give the surety notice of the amount of the proof, except indeed so far as to entitle himself to interest from the surety upon the sum proved. (1)

*Annuities.*

## SECTION XII.

### *Apprentices, Clerks, Servants, and Children.*

Where a sum of money had been paid as a premium with an apprentice, and his master became bankrupt, it was the practice of the commissioners, before the new statute, to recommend it to the creditors to allow the apprentice a gross sum out of the estate, for the purpose of binding him to another master — instead of obliging the apprentice to come in as a creditor under the commission. (2) But this proceeding, though equitable and just in itself, was only matter of indulgence, and not of right; for if it was objected to, the Court could, in strictness, only order the apprentice to be admitted as a creditor. (3) The bankruptcy, also, of the master was held no discharge, in law, of the apprentice's indentures. (4) But now, by the 49th section of the new act, it is declared, that the commission shall enure as a complete discharge of the indentures of an apprentice; and if any sum shall have been paid as an apprentice fee, the commissioners may, upon proof thereof, order any sum to be paid to or for the use of the apprentice which they shall think reasonable, regard being had, in estimating such sum, to the amount of the premium which has been paid, and to the time that the apprentice shall have resided with the bankrupt.

Former practice as to apprentices.

Discharged now by master's bankruptcy; part of premium may be returned.

(1) And see *Watkins v. Flanagan*, 1 Bing. 413. 1 G. & J. 199. 5 B. & A. 186. *Welsh v. Welsh*, 4 M. & S. 333.

(2) *Barwell v. Ward*, 1 Atk. 261.

(3) *Ex parte Sandby*, 1 Atk. 149.

(4) *Buckington v. Shepton*, 8 Mod. 235. Str. 582. 2 Ld. Raym. 1352.

**Children.**

Clerks and servants may have six months' wages.

A child may, in some cases, be admitted a creditor.

With respect to *servants*, also, — by the 48th section of the act, a power is given to the commissioners to order six months' wages, or salary, to be paid to any servant, or clerk, of the bankrupt; but if more than this is due, then the clerk, or servant, must prove for the difference.

A *child* living with the father, and earning money for itself, may be admitted as a creditor under the commission against the father, if he has received that money to the child's use. But Lord Hardwicke said he was under some difficulty in making such an order, for the sake of the precedent; as it might be dangerous in London to lay it down as a general rule, that every child who earns money whilst living with his father, which the latter receives, may claim it as a debt in the event of his father's bankruptcy; for a father frequently, as was remarked in that case, sends out his son to work as a journeyman, and his earnings then are supposed to belong to the father.(1) And where a son had lived with his father seven years as a clerk, receiving only board and lodging, and there was no actual contract for wages — though the father swore it was always his intention to pay him something for his services, and the assignees did not object — yet Lord Eldon, though he lamented the hardness of the case, said, that as there was in reality *no contract* for wages, he could make no order for the son to prove.(2)

Debts owing by the bankrupt to children, or other relations, are always watched in Bankruptcy with great suspicion — with greater, perhaps, than the justice of the case frequently requires; since a man in pecuniary distress, as has been well observed, is more likely to apply to his relations, than to strangers, for that assistance of which he is in want.(3)

(1) *Ex parte Macklin*, 2 Ves. 675. This case arose out of the bankruptcy of Macklin, the comedian, and the petitioner was his daughter; whose earnings, as an actress,

he had received from the managers of different theatres.

(2) *Ex parte Glover*, 1 Mont. Dig. 165.

(3) Per Lord Eldon, 1 Ves. & B. 48.

## SECTION XIII.

*Awards.*

An award, if made before bankruptcy, creates such a debt as may be proved under the commission. Therefore where a man was taken upon an attachment for not performing an award, and afterwards became bankrupt and obtained his certificate, he was ordered on motion to be discharged. For though an attachment is in the nature of a contempt, which is not purged by bankruptcy, yet an action of debt will lie on an award; and the bankrupt ought not to be arrested, prosecuted, or impleaded (1) for any debt due before the bankruptcy.

But where proof was admitted upon an award made *after* the bankruptcy, the proof was in that case ordered to be expunged. (2)

## SECTION XIV.

*Bonds.*

A creditor by bond is entitled to prove his demand against all the parties to it, and to receive dividends upon the whole sum from each estate, provided he does not receive more than 20s. in the pound. If he does receive more, he is accountable for the surplus. And if he has received any part of the debt before he applies to prove, he can then only prove and receive dividends for the residue due to him. (3)

(1) *Baker's case*, 2 Str. 1152.(3) *Ex parte Wildman*, 1 Atk.(2) *Ex parte Kemshead*, 1 Rose, 109. 2 Ves. 113.

**Bonds.**

When  
bond as-  
signed,  
assignor  
must join  
in the  
proof.

A bond, though not strictly assignable at law, may nevertheless be proved by the assignee under a commission of bankruptcy against the obligor; but the assignor must in this case join with the assignee in the usual deposition for the proof of debts — namely, that he hath not received the debt, or any part thereof, or any security or satisfaction for the same. (1)

Bond pay-  
able on  
demand,  
whether  
proveable  
without  
demand  
made.

If a bond be payable generally on demand, and interest has been paid upon it — though no demand has actually been made — it may still be proved under the commission. (2) But where a bond was given by the bankrupt, for the payment of the interest on the principal debt by half yearly payments on Lady Day and Michaelmas, or *within twenty days next after demand*, and for payment of the principal to the *executors* of the obligee — and no demand had been ever made for the interest — the bond was in this case held not to be forfeited, and the obligee incapable of proving it under the commission. (3)

Bond to  
replace  
stock  
proveable.

A bond to *replace stock* by a given day, if it is forfeited before the bankruptcy, is proveable. (4) And where such a bond was also conditioned for making good the dividends payable in the meantime, and the obligor became a bankrupt after the day mentioned in the condition, — Lord Eldon admitted proof for the amount of the dividends before the bankruptcy, and also for the value of the stock at the date of the commission (5), by analogy to the case of annuities. A somewhat different mode of calculation, however, was recently adopted by the Court of King's Bench. In this case the bankrupts had covenanted to replace stock by four instalments: one was replaced when due, two others had become due before the issuing of the commission, and the day for replacing the remaining instalment had not then

As to cal-  
culating  
the value  
of the  
stock.

(1) C. B. L. 146.

(2) *Ex parte Spurling*, C. B. L. 146.

(3) *Winter v. Mousely*, 2 B. & A. 802.

(4) *Ex parte Leitch*, C. B. L.

149.

(5) *Ex parte Day*, 7 Ves. 301.; and see *Shepherd v. Johnson*, 2 East, 211.

arrived; and the Court decided, that the creditor might prove for the value of the two instalments which ought to have been transferred on the days passed before the bankruptcy, to be calculated at the market price of the stock on those days respectively; and that the value of the remaining instalment (which was not then due) was to be calculated at the price on the day of issuing the commission, with a rebate for the interval, between that day and the day appointed for replacing the last instalment. (1) Where a bankrupt before his bankruptcy, on a loan of stock, gave a bond to re-transfer the principal within three years, and to pay the amount of the dividends in the meantime, and also agreed to convey a real estate as a security, and no re-transfer was made, nor any dividends paid, — it was held, that the estate should be sold, the amount of the dividends paid out of the produce, and that other stock should be purchased with the residue — and if not sufficient to repurchase the whole principal stock, that proof should be made for the deficiency; and the assignees were held not entitled to have three years to re-transfer the stock. (2)

**Bonds.**

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A *voluntary* bond, given without a consideration, may be proved, not for the purpose of receiving a dividend with the other creditors, but for payment out of the surplus. (3) But a bond, given for the arrears of a voluntary bond, is held to be a bond for a valuable consideration, and, as such, may be proved for the purpose of receiving a dividend. (4)

Voluntary bonds.

With respect to *bail-bonds*, it has been determined, that where a defendant gives a bail-bond to the sheriff, which is forfeited *before* his bankruptcy by non-appearance, and an action is brought against him afterwards upon the bond — whether the judgment is signed before, or after, the bankrupt obtains his certificate — the debt on the bond is barred, and is, therefore, proveable under the commission — on the

Bail-bonds proveable, if forfeited before bankruptcy.

(1) *Parker v. Ramsbottom*, 3 B. & C. 257.

(3) *Gardner's Assignees v. Skinner*, 2 Sch. & Lef. 228.

(2) *Ex parte Fisher*, 3 Mad. 159. Back. 188.

(4) *Gillham v. Lock*, 9 Ves. 612.

Bonds.

principle, that when the penalty is forfeited the debt becomes due, though execution cannot be taken out for more than the damages (1) — and that the substance of the action on the bail-bond is the same, as that on the original debt. But if the bail-bond is not forfeited until *after* the bankruptcy of the defendant, the bond has been held, in that case, not proveable under the commission, as it was then considered a new and distinct cause of action. (2) So, where a bankrupt before his bankruptcy, upon being sued by a creditor, had given a bond under the 4 Geo. 3. c. 53., (the bankrupt being a member of parliament) for the payment of such sum as should be recovered in the action, together with the costs; and *after* his bankruptcy, but before his certificate, judgment was obtained in such action, — it was held, that a bond of this description, being analogous to a bail-bond, could not under these circumstances be proved under the commission. (3) But now, it is apprehended, though a bail-bond is not forfeited until *after* the bankruptcy of the defendant, it may, under the 56th section of the new statute, be proved under the commission, like any other contingent debt after the happening of the contingency.

As to the right of the bail themselves to prove under a commission against their principal, see post, title “*Sureties.*”

Bond to indemnify lessee from covenants in a lease, not proveable.

Where an assignee of a lease gave a bond to the lessee, for payment of rent and performance of the covenants with the lessor, and became bankrupt, after the bond had become forfeited by the non-payment of the rent, — the bond was held incapable of valuation, and, consequently, not proveable under the commission. And though the lessee may be liable for damages to the lessor, by reason of the non-payment of the rent before the bankruptcy, yet

(1) *Bentley v. Coates*, Cowp. 25. *Dimsdale v. Eames*, 2 B. & B. 8. 4 Moore, 350. *Coulson v. Hammon*, 2 B. & C. 626.

(2) *Cockerill v. Ouston*, 1 Burr. 436.

(3) *Jameson v. Campbell*, 5 B. & A. 250. 1 Bing. 320.

these cannot be proved unless they are actually paid by the lessee to the lessor. (1) *Bonds.*

And see further as to bond creditors, "*Marriage Articles*," "*Annuities*," "*Contingent Debts*," "*Insurance*," "*Sureties*."

## SECTION XV.

### *Bills of Exchange and Promissory Notes, and herein of Cross Paper Demands.*

The holder of a bill of exchange is, like the creditor on the bond, entitled to prove the amount of it against all the parties whom he might proceed against at law, whether drawer, acceptor, or indorser; and he may receive a dividend from the estate of each on the amount, provided he does not in the whole receive more than 20s. in the pound. (2) And it makes no difference, whether the bill is an *accommodation* bill, or whether the holder has given less than the amount for it; except that in this last case, as against the estate of the person *from whom he received it*, he can only prove the exact sum due to him, and is not entitled to more than 20s. in the pound upon the consideration which he gave for it. (3) Thus, where the bankrupt delivers bills with his name upon them to A., for goods furnished by A. to B., and such goods are afterwards partly paid for by B., A. can only prove for the sum remaining due for the goods, and not for the full amount of the bills. But the case would be otherwise, if the bills had been *delivered by B. to A.*, without any communication between the bankrupt and A., — for, then, there would have been no immediate contract between the bankrupt and A.,

A holder may prove against all the parties the full amount of the bill;

except against the party from whom he took it, — when he can only prove for the balance.

(1) *Taylor v. Young*, 3 B. & A. 321. 8 Taunt. 318. 2 Moore, 326. Ex parte *Crossley*. Ex parte *Downward*, Ibid. 157. 3 Bro. 237. Ex parte *Bloxham*, 6 Ves. 449. 600. (2) *English v. Darley*, 2 B. & P. 62. 8 Ves. 53. Ex parte *Earle*, 5 Ves. 833. (3) Ex parte *King*, C. B. L. 156.

Bills of  
exchange.

and the bankrupt would be consequently answerable to the full amount of the bills. (1) So, where a bill is given by the purchaser for the price of goods bought, and the goods are afterwards paid for in part, the seller can only prove under a commission against the purchaser for the balance remaining due to him, and not for the whole amount of the bill; for the bill, so long as it remains in the hands of the seller, represents only such part of the price of the goods as remains unsatisfied. (2)

After re-  
ceiving  
part, hol-  
der can  
only prove  
for  
balance.

And the  
same after  
declar-  
ation of a  
dividend  
under an-  
other com-  
mission.

There is a distinction, also, in every case where the holder of a bill applies to prove it, *after* receiving part of the amount — and where he applies to prove, *before* any payment or composition upon it. If, at the time of proving, he *has* received a part of it, he can then only prove for so much as remains due; for, of course, he could not in such a case swear, that the whole amount was due. (3) And when a dividend is declared under another commission, under which the holder has already proved the bill — though the dividend has not been actually received, yet the amount of it must be deducted from the bill, before it can be proved. (4) Nor does it vary this rule, that the holder had been permitted to enter a claim for the full amount of the bill, *previously* to the declaration of the dividend under the other commission, and had also, previously to such declaration, made an affidavit in proof of his debt, to be laid before the commissioners at the next meeting. (5) In one case of this kind, however, where the commissioners had *improperly rejected the proof*, and admitted the holder only to claim, and it was afterwards decided, upon appeal, that the proof ought to have been received — it was held that, though generally all payments made previously to the proof must be deducted, yet, in

(1) *Ex parte Reader*, Buck. 381.

(2) *Ibid.*

(3) *Cooper v. Pepys*, 1 Atk. 107.

(4) *Ex parte Leers*, 6 Ves. 644.  
*Ex parte Todd*, 2 Rose, 202. note.

(5) *Ex parte Bank of Scotland*,  
2 Rose, 197. 19 Ves. 310. *Ex*  
*parte Worrall*, 1 Cox, 309.



this case the proof would relate back to the time of the claim — and that any sums partially paid after that time were to be considered as payments subsequent to the proof. (1)

But if the holder, *after* having proved for the amount of the bill, receives a part from any of the persons liable to pay it, he is still entitled to a dividend upon the whole amount (2), provided it does not exceed 20s. in the pound upon such part as remains due.

Under very special circumstances, however, the holder of a bill (notwithstanding part payment from another party) has been allowed to prove for the whole amount against the *acceptor*, and to stand as a trustee for such other party, as to all he receives above the real balance due to himself upon it. As where A., being an indorsee of B. and C.'s acceptances for 1364*l.*, sued out a separate commission against B., but had previously by payments received from D. (for whom he had discounted the bills) reduced his debt to 420*l.*, — it was held in this case, that A. might prove for the whole amount of the acceptances, standing as a trustee for D. for all above 420*l.* Lord Eldon, in deciding this case, took into consideration that A. (being the petitioning creditor) was the *only joint creditor who could* come in with the separate creditors, and receive dividends with them — and that as D. could not, therefore, prove so as to receive any dividend, and the bills would be discharged as against the bankrupt by the operation of the certificate, it was but just that D. should have what benefit he could derive from the proof of A. (3)

As all debts payable at a future day, whether the creditor holds a written security or not, are now made proveable (4) under the commission, a bill or note (though not yet due) may of course be proved — and the holder will be

Bills of exchange.

But if received *after proof*, entitled to a dividend on the whole.

Where holder may prove for the amount, though part previously paid.

Bills, though not due, may be proved.

(1) In *re Gibson and Johnson*, cit. per Ld. E. 2 Rose, 201.

(2) *Ex parte Wildman*, 1 Atk. 109. 2 Ves. 113. 2 B. & P. 62. Formerly this was holden otherwise. See *ex parte Lefebvre*, 2 P. Wms. 407.

(3) *Ex parte De Tastet*, 1 Rose, 10.; and see *ex parte Martin*, 2 Rose, 87.

(4) Section 51. The 7 G. 1. c. 51. was the first statute, that made bills and notes not due proveable under a commission.

Bills of exchange.

entitled to receive a dividend thereon generally with the other creditors, deducting only a rebate of interest for what he shall receive, at the rate of 5% per cent., to be computed from the declaration of a dividend, up to the time when the debt would become payable. And the holder of a bill not due may prove the amount against the drawer, though it is at the time uncertain, whether the acceptor will pay it or not when it becomes due. (1) For the *drawing* of a bill constitutes as much a *debitum in præsenti* from the drawer, as the acceptance of it does with regard to the acceptor. (2)

## Objections to proof.

## Illegal consideration.

Whatever would be a valid defence to an action on a bill or note, is a valid objection to the proof of it under a commission. Thus the *illegality* of the *consideration*, for which the bill or note was given, will prevent the holder from proving it in all cases, where he was cognizant of the illegality at the time he took the bill or note; and in some cases also — as where the legislature has declared the instrument to be absolutely void — whether he had knowledge of the illegality or not. (3)

## Statute of limitations.

So where the *statute of limitations* would prevent the holder from recovering at law, he is equally prevented from proving on the bill or note. (4) The payment of a dividend by the assignees of one of two makers of a joint promissory note, has been held to prevent the other maker from availing himself of the statute. (5) But this doctrine has been since doubted, and has been refused to be extended to a case, where the indorsee had proved for an antecedent debt, and had merely exhibited the note as a security. (6)

## When bill given in payment

A bill, in payment of which another bill has been delivered to the holder, cannot in general be proved; but if

- (1) *Starey v. Barns*, 7 East, 435. 479. *Ex parte Seaman*, Ibid. *Ex parte Roffey*, 2 Rose, 245.  
 (2) *Macarty v. Barrow*, 2 Str. 949. 3 Wils. 16. 2 Barnard, 251. 5. (5) *Jackson v. Fairbank*, 2 N.B. 340.  
 7 East, 437. n. Dub. tamen Lord Ellenborough, 7 East, 440. (6) *Brandram v. Wharton*, 1 B. & A. 463., and see *Atkyns v. Tredgold*, 2 B. & C. 23.  
 (5) And see post. "Illegal and void Debts."  
 (4) *Ex parte Dewdney*, 15 Ves.

the former bill is permitted to remain with the holder, then if the latter bill is not paid, there is no objection to the proof of the former. (1)

If the holder enter into a *composition* with the *acceptor* or *maker* of a bill or note, or agree to give him time for payment of it, without the previous assent of the other parties, he thereby discharges all those other parties. (2)

But where a note is made by one person as principal, and the others as *sureties*, then the compounding with one of the sureties will not have the effect of discharging the principal, or indeed any of the other sureties; for the discharge of the surety is very different (3) from the discharge of the principal.

The same *laches*, too, of the holder—which would discharge any other party at law if he had continued solvent—will equally preclude the holder from proving under a commission against such party. Thus, if the holder neglect to give notice (4) of the dishonor of a bill to the drawer, and the indorsers—or do not at least use due diligence in attempting to give notice (5)—they are thereby respectively discharged. If, however, the acceptor has no effects of the drawer's in his hands—in this case, the *drawer* will not be discharged, as he cannot then be injured by the want of notice (6); but the *indorser* in such a case is still entitled to notice. (7) The *onus* of proving the bill to be an accommodation bill, so as to dispense with the giving notice, is thrown upon the party contending that it is

*Bills and notes.*

of another bill.

Compounding with acceptor;

unless a surety.

*Laches.*

Want of notice of dishonor.

(1) *Ex parte Barclay*, 7 Ves. 957.

(2) *Ex parte Smith*, 3 Bro. 1. C. B. L. 171. *Ex parte Wilson*,

11 Ves. 410. *English v. Darley*,

2 B. & P. 61. *Anderson v. George*,

1 Burr. 353. *Kellock v. Robinson*,

2 Str. 745. *Tindal v. Brown*, 1 T. R. 167.

(3) *Ex parte Gifford*, 6 Ves. 805.

(4) *Goodal v. Dolley*, 1 T. R. 712. *Tindal v. Brown*, *supra*.

*Gee v. Brown*, 2 Str. 792. *Blissard v. Hurst*, 5 Burr. 2670. *Hart-*

*ley v. Case*, 4 B. & C. 339. *Walter v. Haynes*, 1 Ryan & M. 149.

*Mann v. Moors*, *Ibid.* 249.

(5) *Burridge v. Burgis*, 3 Camp. 262. *Crosse v. Smith*, 1 M. & S. 545. *Goldsmith v. Bland*, Bay. on Bills, 224.

(6) *Ex parte Holden*, C. B. L. 167. *Bickerdyke v. Bollman*, 1 T. R. 405. *Rogers v. Stevens*, 2 T. R. 713. *Walwyn v. St. Quintin*,

1 Bos. & P. 652.; and see 13 East, 214. 4 Camp. 285. 1 Star. 116.

(7) *Wilks v. Jacks*, Peake, 202.

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notes.*

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sp. (1) And if the *holder* has not given notice *himself* to the drawer, he cannot avail himself of notice given by any other person. (2) The bankruptcy or insolvency of the acceptor, it has been determined, does not excuse the holder from giving notice to the drawer, or any other party entitled to notice. (3) But it was held by Lord Thurlow, that if the *drawer*, or *indorser*, is a bankrupt at the time of the dishonor of the bill, it was unnecessary to give notice, either to him or his assignees. (4) In a recent case, however, before the Court of King's Bench, it was decided, that where the house of the bankrupt drawer is kept open by an agent of his assignees, *there* notice is essential — and a neglect to give it will bar the holder's right to prove against the drawer's estate. (5) Lord Thurlow's decision was not cited in argument in the last case — but the necessity of notice under these circumstances has been in some measure recognized in a case before Lord Eldon, in which he decided, that notice of a dishonored bill given to a bankrupt, as drawer, *before the choice of assignees*, was sufficient notice to entitle the holder to prove. (6)

*Bills payable to a fictitious payee.*

If a bill be made payable to a *fictitious* payee, with the knowledge of the acceptor, it is considered in effect as payable to the bearer; and a *bond fide* holder of it for a valuable consideration may prove it under a commission against the indorser, or any other party, who knew, at the time he put his name to it, that the payee was a fictitious person. (7) But where the acceptor, at the time of his acceptance, was ignorant that the payee was a fictitious person, the bill in such a case has been held to be void. (8)

(1) *Ex parte Heath*, 2 Ves. & B. 240.

(2) *Ex parte Barclay*, 7 Ves. 597.

(3) *Esdaile v. Sowerby*, 11 East, 117. *Thackray v. Blackett*, 3 Camp. 165. 11 Ves. 412. 2 B. & P. 279. Bayl. 115. Chitt. 210.

(4) *Ex parte Smith*, 3 Bro. 1.

(5) *Rohde v. Proctor*, 4 B. & C. 517.

(6) *Ex parte Moline*, 19 Ves. 216.

(7) *Ex parte Clarke*, 3 Bro. 238. *Ex parte Allen*, C. B. L. 172.; and see *Tatlock v. Harris*, 5 T. R. 174. *Vare v. Lewis*, *ibid.* 182. *Muct. v. Gibson*, *ibid.* 481. *Collis v. Emct.*, 1 H. B. 313. *Gibson v. Minct.*, *ibid.* 569. *Gibson v. Hunter*, 2 H. B. 288.

(8) *Bennet v. Farnell*, 1 Camp. 130. 180. c.

The same objections, also, as to the *form* of the bill, which may be urged with effect in an action, apply to the proof of it under a commission. Thus, a bill or note is bad, if the sum for which it is given is payable on a *contingency* — or if, in the case of a note, the promise to pay is a *conditional*, and not an absolute, promise. (1) A promissory note, therefore, given to pay a sum, “when the circumstances of the maker will admit without detriment to himself or family,” does not create a debt proveable under a commission. (2) So, a promissory note made payable “in cash, or Bank of England notes,” has been for the same reason held bad for uncertainty; and the holder of several notes of this description, who received them from an intermediate person, was not allowed to prove under a commission against the maker, either upon the notes (3), or as for money had and received. (4)

*Bills and notes.*

Bill or note payable on a contingency, bad.

If the bill or note has not a proper *stamp* affixed to it,— this, also, is another objection, which is as valid in Bankruptcy, as at law. (5) But though a bill be void for want of a proper stamp, proof may still be made for the original consideration. (6)

Want of proper stamp.

Where a bill is taken *without the indorsement* of the party from whom the holder receives it, the bill itself cannot be proved under a commission against that party; for no debt is proveable on a bill, but what arises on the face of it. (7) And, though there is a private mark on the bill,

Bill not indorsed by party delivering it, not proveable against him.

(1) *Smith v. Bohemie*, cit. 2 Ld. Raym. 1362. 1396. *Roberts v. Peake*, Burr. 323.; &c.; and see Bayl. 8.

(2) *Ex parte Tootell*, 4 Ves. 372.

(3) *Ex parte Imeson*, 2 Rose, 225.

(4) *Ex parte Davison*, Buck. 31.

These two last cases, it must be confessed, carry the doctrine of *uncertainty*, in the construction of the promise in a note, to a point somewhat bordering on the extreme; — and more especially at a time when Bank of England notes

were declared by the legislature to be a legal tender, and formed the chief circulating medium of the country.

(5) *Ex parte Manners*, 1 Rose, 68.

(6) *Alves v. Hodgson*, 7. T.R. 241. *Ruff v. Webb*, 1 Esp. 129. *Brown v. Watts*, 1 Taunt. 353. *Wilson v. Vysar*, 4 Taunt. 288.

(7) *Ex parte Roberts*, 2 Cox, 171.; and see *Fenn v. Harrison*, 3 T.R. 759. *Fyde v. Clarke*, 1 Esp. 447.

*Bills and notes.*

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Contrà as to acceptance of a foreign bill.

Bill lost.

When an unindors-

and the party admit, that upon all bills transferred by him without indorsement, on which he made that mark, he considered himself as much liable as if he had indorsed them (1) — or though the party write over the last indorsement, “Pay B. or order,” — the rule is the same; for in neither of these cases does the party contract any legal obligation upon the face of the bill. (2) So, where there was even an *engagement in writing* from the party, to warrant the payment of the bill in like manner as if he had indorsed it, which engagement came into the hands of the holder for a valuable consideration, — yet this circumstance has been held not to entitle the holder to prove the bill, against the party who had so engaged to pay it. (3) This last point has, however, been ruled differently by Lord Eldon with regard to an *acceptance*, which, he held, need only be of such a nature, as will render the party liable to an action upon it at law. And, as a letter from a party (on whom bills are drawn) undertaking to accept them, has been held at law to amount to an acceptance of the bills, so, he thought, that they might be equally proved under a commission against such party. (4) But this doctrine of acceptance by *letter* applies now only to *foreign* bills of exchange; for by the 1 & 2 Geo. 4. c. 78. s. 2. all *inland* bills must be accepted by *writing upon the bill*. And by the same statute, when a bill is accepted payable at a particular place, this is to be deemed a GENERAL acceptance; and presentment at that place need not be proved, unless it is expressed in the acceptance to be *only* payable at that place.

Where a bill has been *lost* by the holder, he may nevertheless be permitted to prove it, upon giving an ample indemnity to the satisfaction of the commissioners. (5)

When a bill, which has been taken without the indorse-

(1) Ex parte *Shuttleworth*, 3 Ves. 368.

(2) Ex parte *Isbester*, 1 Rose, 20. *Vincent v. Hurlock*, 1 Camp. 422.

(3) Ex parte *Harrison*, 2 Bro. 614. Ex parte *Bell*, 1 Mont. 192.

In re *Barrington*, Sch. & Lef. 112.; and see post.

(4) Ex parte *Dyer*, 6 Ves. 9.; and see *Clarke v. Cock*, 4 East, 57. *Wynne v. Raikes*, 5 East, 514.

(5) Ex parte *Greenway*, 6 Ves. 812.

ment of the bankrupt, is to be considered a *purchase*, and when a *pledge*, will depend on the circumstances of the case, and the nature of the agreement between the parties. An exchange of paper between two persons, where the bills are of the same amount, has been considered to be a *purchase* by each party of the bills of the other. As where G. accepted a bill for J. and W., and in exchange they delivered to him at the *same time* a bill to the same amount drawn and accepted by other parties, but not indorsed by J. and W.,—Lord Eldon held this to be a *purchase* on the part of G. of the last mentioned bill—that being the consideration for the acceptance given by him to J. and W.;—and though G. had paid his acceptance, and the bill he received was dishonored, yet he was not permitted to prove the amount of such bill under a commission against J. and W. (1) If the bill is *discounted* (2) by the taker, it is then also considered as a purchase; and, whenever a bill is taken as a purchase, it liquidates the debt due from the person transferring it to the full amount of the bill (3), and, consequently, the debt cannot be proved under a commission against such person.

Where, however, a bill without indorsement is taken as a security for an *antecedent debt*, and there is no express agreement that it is taken in *payment* against all risks (4), it is then considered as a *pledge*, and does not destroy the debt; therefore, if the bill in this case be bad, though the bill itself cannot be proved under a commission against the

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ed bill considered a purchase, and when a pledge.

In cases of *purchase* bill cannot be proved.

But in cases of *pledge*, the original debt provable, if bill entirely bad.

(1) Ex parte *Hustler*, 1 G. & J. 9.

(2) Mr. Eden in his Treatise on the Bankrupt Law (page 136. note (p.)) very justly observes, that there is a great inaccuracy in several of the books, (1 Rose, 23. Buck. 115. n.) as to the distinction taken between a transfer with, and without, indorsement, — in denominating the one transaction “as a sale,” and the other “as a discount,” — a *discount* being, in fact, nothing more than advancing the

money secured by the bill (whether indorsed or not) *minus* the interest; and the person so advancing the money, if he does not take the indorsement of the party, is in reality the *purchaser* of the bill.

(3) Ex parte *Whitter*, C. B. L. 124. Ex parte *Roberts*, *ibid.* Ex parte *Smith*, *ibid.* *Bank of England v. Newman*, 1 Ld. Raym. 442. 12 Mod. 241. Com. Rep. 57.

(4) *Owenson v. Morse*, 7 T. R. 651.



*Bills and notes:*

If of any value, the bill should be sold, and creditor prove for the difference.

Where bankrupt has only FORGOTTEN to indorse a bill, it may be indorsed afterwards.

debtor, yet the original debt, or so much as remains due, may be proved. (1)

If the bill is taken as a *pledge*, it should in strictness be sold, and the produce applied in satisfaction or reduction of the creditor's debt; and if any part remains unsatisfied, he will be then of course entitled to prove for the residue: or the Lord Chancellor will in some cases order, that the creditor shall be at liberty to bring an action on the bill in the name of the assignees, upon his indemnifying them, and undertaking to account for any surplus recovered. And in either case, if the amount of the bill or note exceeds the debt for which it is pledged, the creditor will have to pay the costs of the application, as in the case of an equitable mortgage upon the deposit of deeds without any written agreement. (2)

In some cases, where the bankrupt has merely *forgotten* to indorse the bill or note, which is transferred by him for a valuable consideration, it has been held, that he may indorse it after his bankruptcy (3); — for the act of indorsement is in such case considered a mere form — the transfer for consideration being the substance, which creates an equitable right, entitling the holder to call for the form. (4) So, where the whole beneficial interest is out of the bankrupt, the assignees have been in that case ordered to indorse a bill under the above circumstances — in such a manner, however, as to secure them from personal responsibility. (5) And where the payee of an accommodation bill indorsed it after an act of bankruptcy, it was holden, that this did not prevent the indorsee, for valuable consideration, from recovering on it against the acceptor. (6) So, where a bankrupt had trans-

(1) *Ex parte Blackburn*, 10 Ves. 206. *Ex parte Rathbone*, Buck. 215.; and see *Richardson v. Kirkman*, C. B. L. 174.

(2) *Ex parte Brown*, 1 G. & J. 407.

(3) *Smith v. Pickering*, Peake, 50. *Anon.* 1 Camp. 492. n.

(4) Per Sir T. Plumer, 2 J. & W. 243.

(5) *Ex parte Greening*, 13 Ves. 206. *Ex parte Mowbray*, 1 J. & W. 428.; but see *ex parte Hall*, 1 Rose, 13. *Ex parte Stewart*, 1 G. & J. 344.

(6) *Wallace v. Hardacre*, 1 Camp. 45.



ferred, without indorsing, a note for valuable consideration to B. & C., and afterwards died intestate, and B. took out letters of administration to him, and then indorsed the note to B. & C., — it was held, that B. & C. might recover against the maker of the note (1), though it was given for the accommodation of the bankrupt, and though it was not indorsed until several years after it was due.

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But the mere circumstance of indorsement, in the transfer of a bill or note, does not make a difference in estimating the rights of the parties, if the real meaning of the transaction was only *deposit* — the distinction depending not on the fact of indorsement, but on the intention of the indorser. In this case, however, it must be clearly established, that notwithstanding indorsement, the object was nothing but deposit. (2) Thus, where several bills were delivered to a mortgagee, some of which were indorsed and others not indorsed — and the question was, whether the bills were intended to be in the nature of a collateral security, or of an absolute transfer — the Court inferred (from their being a mortgage, and from the circumstance of some of the bills not being indorsed) that those which were indorsed were intended, as well as those unindorsed, to be held as a security only. (3) And if A. give B. a bill to the amount of 300*l.* as a *security* for a debt of 150*l.* — whether A. indorse it or not — B., as against A., can only prove 150*l.* — and he will be a trustee for A., in respect of any surplus which he may receive from the other parties to the bill. (4) If the holder of bills indorsed by the bankrupt, instead of proving for each bill, proves the whole amount of his debt, for which, he states in his deposition, that he has received no security or satisfaction whatsoever except the bills he holds, — he will be precluded, after thus treating the bills as a security in his deposition, from saying afterwards they were not to be treated as a security,

When the object of the transfer of a bill is merely deposit,

the holder can only prove for the real debt due.

Holder estopped after having once treated the bills as a security.

(1) *Watkins v. Maule*, 2 J. & W. 237.

(3) *Ex parte Baldwin*, cit. 19 Ves. 230.

(2) 19 Ves. 232.

(4) Per Lord Eldon, *ibid.*

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Indorsement *prima facie* evidence of absolute transfer.

Where bills indorsed by an agent.

Where bill paid by indorser after bankruptcy of the acceptor, may be proved; but not if paid by a party not liable on the bill.

because they were indorsed. (1) Indorsement is, however, always considered *prima facie* evidence of an absolute transfer, unless the object of mere deposit is clearly shown, or can be plainly inferred from the nature of the transaction between the parties.

Where A. employs B. to get bills discounted, which A. had not indorsed, and B. indorses them in his own name, the better to effect that purpose, and both A. and B. become bankrupt, — A.'s estate must relieve B.'s from the liability incurred by the (2) indorsements on these bills; though the case would be otherwise, if A. had told B. expressly that he would not indorse the bills; — for then B. would have been an agent with only a limited (3) authority.

If the acceptor of a bill for value become bankrupt, and the indorser is obliged to pay it in consequence of the bankruptcy, he may prove the debt under the commission, although it was not taken up by the indorser till *after* the commission issued. (4) It has been held, however, that a party so claiming to prove a bill taken up by him after the commission issued, must himself have contracted a liability upon it *before* the issuing of the commission. As where a bill, after the bankruptcy of the acceptor, was taken up by a party, who had previously discounted it without indorsing it, — Lord Eldon refused him permission to prove it under the commission, upon the ground that he had not made himself liable on the bill by indorsement — and added, that all the cases of parties claiming to prove, in respect of the payment of bills after a commission of bankruptcy, have been, where the party is *himself liable* on the

(1) Ex parte *Burn*, 2 Rose, 58.

(2) Ex parte *Robinson*, Buck. 113.

(3) *Fenn v. Harrison*, 3 T. R. 757.

(4) Ex parte *Brymer*, C. B. L. 165. *Cowley v. Dunlop*, 7 T. R. 565. Ex parte *Seddon*, cit. *ibid*.

570. Ex parte *Hale*, 3 Ves. 304.

*Buckler v. Buttivant*, 3 East, 72. *Houle v. Barter*, *ibid*. 177. *Joseph*

*v. Orme*, 2 N.P. 80. Contra *Brookes v. Rogers*, 1 H. B. 640. *Howis v.*

*Wiggins*, 4 T. R. 714.; but the two last cases were cases of sureties.

bill. (1) But Lord Thurlow upon a former occasion *Bills and notes.* said, that he considered it as a very clear point, that a bill of exchange, though negotiated after the bankruptcy of the acceptor, might be proved under his commission; as the debt accrued from the acceptor by his original acceptance of the bill. (2) Accordingly it has been holden, that the indorsee of a bill, though indorsed to him after the bankruptcy of the acceptor, can prove it under his commission, but only for such amount, as the indorser himself could have proved at the time of the commission. (3) So that it should seem, if the case of *ex parte Isbester* could have been considered merely a *transfer of the bill for value* to a third person, after the commission against the acceptor — and not as a *payment* of the bill by a person, who was in fact never a *party to the bill*, or liable to pay it — the bill might have been proved under the commission.

Bill, however, may be negotiated after bankruptcy.

Where *bankers' notes* were bought up *after* their bankruptcy, they cannot be proved by the holder, — unless it can be shewn that the persons, from whom they were purchased, were individually entitled to a proof in respect of the notes. (4) But there have been some special exceptions (5) to this rule; and in one case, where one of the partners of the bank, after getting his certificate, took up the notes of the firm, he was permitted to prove (6), — upon making an affidavit, that he would not have paid the notes, unless the holders had had a valid claim against the firm.

Where banker's notes bought up after bankruptcy.

And in all these cases, where a bill is negotiated **AFTER** IT IS DUE, whether by indorsement or mere delivery, the party receiving it takes it on the credit of the person transferring it, and subject to all the equities to which it may be liable; whereas **BEFORE** a bill is due, the party receives it on its own intrinsic credit, and is not bound to enquire

Difference between negotiating a bill before, and after, it is due.

(1) *Ex parte Isbester*, 1 Rose, 20.

(3) *Ex parte Deey*, 2 Cox, 423.

(2) *Ex parte Brymer*, ante; and see *ex parte Thomas*, 1 Atk. 73.

(4) *Ex parte Rogers*, Buck. 490.

2 Wils. 135. *Bingley v. Maddison*, ibid.

(5) *Portsmouth Bank* case, cit.

7 T R. 499.

(6) *Ex parte Atkins*, ibid. 479.

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Where, after the proof of several bills,—any one paid, in full, must be deducted from the proof.

into any circumstance existing between the person from whom he takes it, and any of the previous parties to the bill. (1)

Where the holder of *several* bills, indorsed to him by a bankrupt for whom he had discounted them, proves the aggregate amount of them under the commission, and any of the bills are afterwards paid IN FULL, the amount of the bills so paid must be deducted from the proof, and the future dividends be paid only upon the residue of the debt. (2) And the same, where the bills have been indorsed by the bankrupt as a security for a general balance — or for a debt, even exceeding their amount, and the creditor proves the whole amount of his debt, excepting the bills as a security. (3) And if the dividends have been paid upon the whole proof without such deduction, the assignees are not thereby concluded — for the Lord Chancellor on petition will order them to be refunded. (4) In this respect, we perceive the rights of the creditor differ from the case, where he proves only a *single* bill; for *there* he is entitled to a dividend on the full amount of his proof, provided he does not receive in the whole more than 20s. in the pound. (5) But when *several* bills are thus proved — as each bill forms a separate and distinct portion of the whole debt — if a creditor was permitted, after one of the bills was paid *in full* to take a dividend upon the gross sum, without deducting the amount of the bill paid off, — he would then be receiving, as to that portion of the debt which was composed of the paid bill, more than 20s. in the pound.

Where bill taken up for the honor

Where the acceptor of a bill becomes bankrupt, and another person after the bankruptcy takes up the bill for the honor of the drawer, that person has no right to prove

(1) *Brown v. Davies*, 3 T. R. 80.  
*Boehm v. Stirling*, 7 T. R. 427.  
*Brown v. Turner*, *ibid.* 630. *Tinson v. Francis*, 1 Camp. 19. Chitt. 126.

(2) *Ex parte Smith*, C. B. L. 155.  
*Ex parte Bloxham*, *ibid.*

(3) *Ex parte Wallace*, C. B. L. 155. *Ex parte Crossby*, *ibid.* *Ex parte Rufford*, 1 G. & J. 41. *Ex parte Barratt*, *ibid.* 327.

(4) *Ex parte Burn*, 2 Rose, 55.

(5) *Ante*, 239.

against the estate of the acceptor, unless the acceptor had effects of the drawer's in his hands.—for such person can only stand in the place of the drawer. (1)

With respect to proof of what are termed *accommodation* bills—that is, bills to which one of the parties has subscribed his name without receiving any value—the holder of a bill of this description, who has *bonâ fide* given a valuable consideration for it, is not affected by the want of consideration between the other parties. (2) But such bill cannot be proved as between the parties to the accommodation. And where a debtor to a bankrupt's estate, after notice of the bankrupt's insolvency, acquired a bill with the bankrupt's name upon it, (which he KNEW then was a mere *accommodation* bill given by the bankrupt, and formed no demand upon the bankrupt's estate) with a view to set it off against his own debt,—he was held not to be a *bonâ fide* holder of such bill;—and, having proved for the difference between the amount of the bill and the debt he owed the bankrupt, his proof was ordered to be expunged. (3) When two persons, however, agree that the one shall accept and pay all bills, which a third may draw upon him on account of the other—and the drawer has effects in the hands of one of those parties, though not in the hands of the acceptor—the acceptor by such an agreement makes himself equally liable with that party, in whose hands the drawer has effects—and the drawer may therefore prove such bills, under a commission against the acceptor. (4)

When a party lends his name upon a bill, whether as drawer, acceptor, or indorser, without receiving value for such accommodation, he is substantially a surety for the other party, who has received a consideration for the bill;

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of the drawer.

Accommodation bills when proveable.

Party lending his name, substantially a surety.

(1) Ex parte *Lambert*, 13 Ves. 174. overruling. Ex parte *Wackerbath*, 5 Ves. 574.

(2) Cull. B. L. 97. Chitt 442.

(3) Ex parte *Stone*, 1 G. & J. 191.; and see *Fair v. M'Iver*, 16 East, 130.

(4) Ex parte *Marshall*, 1 Atk. 130.

*Accommodation bills.*  
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Surety entitled to benefit of the holder's proof.

Former disability attached to him.

May now prove, though he pays the debt after the commission.

and if, through the default of that party, he is obliged to take it up, he is entitled, of course, to be indemnified by the estate of that party. In bills of exchange, Lord Hardwicke observes, there is a double contract—the first between the principal debtor and creditor—and also an implied contract, that the principal debtor will indemnify the surety—so that if the creditor (the indorsee) comes upon the surety (the indorser), the indorser or his assignees may come in against the original or principal debtor; and he added, that this was likewise the case, where *no consideration* was paid by the original drawer.(1) This principle has been often recognized in Bankruptcy. As where the holder of a bill proved it against the person, who was ultimately bound to pay it, before he called upon the surety, and he afterwards received from the surety either the whole or a part of the debt,—the Court was always accustomed to give the surety the benefit of the holder's proof(2) under the commission. But there was a great hardship formerly, where the surety paid off either the whole of the bill subsequent to the act of bankruptcy, or part of it before the creditor had proved; for, in the one case, the creditor could only prove for the residue of the debt owing at the time of the proof—and, in the other, the surety was held to be barred entirely from proving—as, *quoad* him, it became a debt subsequent to the bankruptcy.(3) To remedy this grievance to the surety, the 49 G. 3. c. 121. s. 8. first enacted, and the 52d *section* of the new statute enacts nearly in the same words, that any surety or person liable for any debt of the bankrupt, though he pays the debt, or any part of it, after the commission issues, may stand in the place of the creditor, if the creditor has proved—and if not, then that the surety may prove his demand in respect of such payment, not disturb-

(1) *Ex parte Walton*, 1 Atk. 125.

(3) *Brookes v. Rogers*, 1 H. B.

(2) *Ex parte Ryswicke*, 2 P. 640. *Howis v. Wiggins*, 4 T. R. Wms. 89. *Ex parte Marshal*, 714. 1 Atk. 129. *Ex parte Mathews*, 6 Ves. 285.

ing former dividends. And this benefit is given to the surety, notwithstanding he may have become so even after an act of bankruptcy — provided he had no notice then of any act of bankruptcy. The words “person liable” in the above enactment, Lord Eldon has observed (1), were adopted for the convenient latitude of comprehending all those, who could not strictly be considered as sureties, but who were entitled to the same protection. Thus, the acceptor of a bill of exchange is not strictly a surety for the drawer — the acceptor being, on the face of the bill, liable in respect of *his own* engagement merely; — but if the debt, which the acceptor adopts, be in reality the debt of the drawer, and the contract between the drawer and acceptor be in the nature of an accommodation transaction, viz. that the drawer should be the person finally responsible, — in this case, though the acceptor would not strictly be a surety, yet he is a “person liable.”

*Accommodation bills.*

Acceptor of an accommodation bill treated as a surety.

In conformity, therefore, with the above enactment, — when the acceptor of a bill for the accommodation of the drawer is, after the drawer's bankruptcy, obliged to pay it — though the bill itself is, strictly speaking, gone by the acceptance being paid — yet the acceptor may prove for the amount, as having paid it for the use of the drawer. (2) And such proof, as it should seem, may also include the costs (if previously ascertained) of an action brought against the acceptor by the holder, in consequence of the drawer not providing funds to pay the bill when due. (3) If the acceptor assigns his debt to a third person, he may be called upon by such assignee to prove it, and the assignee will be entitled to all the dividends in respect of it. (4)

And may prove against the drawer for the amount, and the costs.

(1) 3 V. & B. 40.

(2) Ex parte *Lloyd*, 1 Rose, 4. *Sedman v. Martinnant*, 13 East, 427. Before the 49 G. 3. c. 121. this could not be done. See ex parte *Walton*, 1 Atk. 122. *Chilton v. Whiffin*, 3 Wils. 13. *Young v. Hockley*, *ibid.* 346. *Vanderheyden*

*v. De Paibe*, *ibid.* 528. *Snaithe v. Gale*, 7 T. R. 364. Ex parte *Beaufoy*, C. B. L. 158. *Heskingson v. Woodbridge*, Doug. 166.

(3) *Vansandan v. Corsbie*, 3 B. & A. 13. 8 Taunt. 550. 2 Moore, 602.

(4) Ex parte *Lloyd*, *supra*.

**Accommodation bills.**

If surety pays off the bill, after the holder has received a dividend, holder bound to account to surety.

This equity (which is now in fact become a legal right) of the surety on a bill, to stand in the place of the holder who has proved it under a commission, was before the 49 G. 3. so far qualified, that it was not permitted to operate to the prejudice of the holder — if the latter had any other distinct demand against the bankrupt's estate; so that if there would be any diminution of the dividends upon such distinct debt, occasioned by the surety's standing in his place and receiving dividends upon the amount of the bill, such diminution was directed to be made good out of the dividends receivable by the surety. (1) But this point has been differently decided since the 49 G. 3. As where a surety on a note, after the bankruptcy of the debtor, paid it off to the creditor, the latter having previously proved for a greater amount, and received a dividend on the gross amount of his debt, — Lord Eldon ordered, that the surety should receive from the creditor the dividend on the note, which the creditor had already been paid. (2)

As to the discharge of the surety on a bill or note, by the holder discharging or compounding with the principal, see post, title "Sureties."

**Cross bills, former practice in proof of.**

Where, however, a party lending his name on a bill or note for the accommodation of the bankrupt, had taken for his own security a counter bill, with the bankrupt's name upon it, he was, independently of the 49 G. 3., permitted to prove the latter under the commission, though the former bill had not become due. For the mere liability to pay money was held a good consideration for a bill of exchange, and would entitle the party to come in as a creditor under the commission, although the payment in respect of the liability was *in futuro*, or depended upon a contingency. (3) And this, it was said, did not militate against the old rule, that contingent debts were not prove-

(1) *Ex parte Turner*, 3 Ves. 243.  
*Ex parte Rushworth*, 10 Ves. 409.  
*Paley v. Field*, 12 Ves. 435.

(2) *Ex parte Brook*, 2 Rose, 334.

(3) *Toussaint v. Martinant*, 2 T. R. 100. *Hodgson v. Bell*, 7 T. R. 97.



able, because the claim under the commission was upon an instrument creating an absolute debt at law.(1) But though the holder of a counter-bill could prove it before the other bill became due, yet the practice was to reserve the dividends, until it appeared to what extent he had been damnified, and whether he had exonerated the bankrupt's estate from the bill or acceptance, given by him to the bankrupt in exchange for such counter-bill.(2) It was afterwards doubted, whether such proof ought to have been permitted, before the party applying to prove had taken up his own paper, or had paid the original debt.(3) And it seems now to be a settled rule, that the surety claiming to come in as a creditor upon an exchange of acceptances must, before he can be permitted to prove, take up his own bills, or exonerate the bankrupt's estate from any liability in respect of them.(4)

*Accommodation bills.*

Party applying to prove, must take up his own bills.

Where there has been a mere exchange of acceptances for the same sum, between the creditor and the bankrupt, the creditor cannot prove against the bankrupt any payment made on the creditor's own acceptance; for in such a transaction the law considers, that the creditor did not give his own acceptance in consideration of a promise of indemnity from the bankrupt, but in consideration of an actual and executed delivery of the other acceptance. Each party, therefore, under these circumstances, is held to have liquidated his claim on the other, by the acceptance which he takes in lieu of his own.(5) Whether, in other exchanges of paper between two parties, one acceptance is to be considered as given, or one bill transferred in

In exchange of acceptances for the same sum, no proof allowed of any payment.

Evidence of one bill being given in consi-

(1) *Ex parte Maydwell*, C. B. L. 159. *Rolfe v. Caslon*, 2 H. B. 570. *Ex parte Beaufoy*, C. B. L. 158. *Ex parte Clavricarde*, *ibid.* 160. To such miserable devices, says Mr. Eden, were the courts compelled to have recourse, in order to effect substantial justice, and to elude the operation of a harsh and inequitable rule of law. *Eden*, B. L. 141.

(2) *Ex parte Curtis*, C. B. L. 162. *Ex parte Lee*, *ibid.* *Ex parte Browne*, *ibid.*

(3) *In re Boroness*, C. B. L. 161.

(4) C. B. L. 162. *Ex parte Bloxham*, 8 Ves. 531.

(5) *Cowley v. Dunlop*, 7 T. R. 565. *Butler v. Buttivant*, 3 T. R. 72.

***Accommodation bills.***

deration of the other ;

but one party paying his own acceptance, may prove the counter one.

When both parties bankrupt, dividends paid by one estate not provable against the other.

Where both parties in cross-bill transactions become bankrupt, — whether proof to be made by the creditor estate on the bills, or the cash balance.

consideration of the other, must be determined by the particular circumstances of each case. (1) Any variation in the time of payment, or of the amount, of the respective bills, — is evidence whether the parties did, or did not, transfer the bills in consideration of each other — though not conclusive evidence. But an agreement by each party to pay his own acceptances is conclusive evidence, that the bills were given in consideration of each other. (2) Where, in an exchange of acceptances, one party takes up and pays his own acceptance after the bankruptcy of the other, and the bankrupt's acceptance has not been proved by any other holder, the drawer may, of course, prove it under the commission. But if both parties become bankrupt, and the acceptance of one party has been proved by the holder of it against the estate of the drawer, as well as against that of the acceptor, and the holder receives dividends under each commission — the amount of the dividends paid by the assignees of the drawer cannot be proved under the commission against the acceptor ; for that would be charging the estate of the acceptor twice for the same debt. (3)

In transactions of this nature, where both parties become bankrupt, and there has been a considerable exchange of paper between them, questions of great difficulty frequently occur in determining the amount of proof to be made by the assignees of that party, who has accepted to a greater amount than the other — more especially, if there happen to be outstanding acceptances of each party capable of proof by the respective holders, or bills which have been already proved under each commission. In one case of this kind, where the assignees of one firm claimed to prove against the estate of the other outstanding bills, that might be proved by the holders against both estates, — Lord Loughborough held that, as between the two estates, no proof could be made of the unsatisfied bills of either party ; and he directed an account of the dealings between

(1) Per Lord Ellenborough, 3 East, 76.

(2) Ibid. 7 T.R. 565. Chitt. 44

(3) *Cowley v. Dundas*, *supra*.

the parties to be taken, excluding those bills, and the balance to be ascertained upon the general dealings between them, considering bills duly honored as so much cash—for which balance only the proof was ordered to stand. (1) In a subsequent case, under the same bankruptcy, where the assignees of one house petitioned to prove against the estate of the other, not only for the cash balance between the two estates, but also in respect of the dishonored bills, part of which having been negotiated, were proved by the respective holders against both estates,—Lord Loughborough said, that upon consideration of the case of *Ex parte Walker* it struck him, that there were but two ways of taking the account between the two estates—either to consider all the bills to be struck out of the case entirely, as if issued for a bad purpose—like gambling transactions, &c., upon which there could be no proof—or to consider them all as good bills,—and that he did not see a middle course; and he permitted the cash balance in this case only to be proved. (2)

*Accommodation bills.*

Where cash balance alone proveable.

This principle adopted by Lord Loughborough was afterwards recognized by Lord Eldon in the following case, where there were mutual advances of cash between the parties, but paper upon one side only. A. and B. had dealings together, in the course of which it appeared that B. had received from A., in *cash and bills*, 6424*l.* 9*s.* 8*d.*, and A. had received from B., in *cash alone*, 5284*l.* 19*s.* 7*d.*, making a balance of 599*l.* 9*s.* 8*d.* upon the whole account in favour of A. Both became bankrupt, and several of the bills delivered by A. to B. (amounting to 1098*l.*) were dishonored, and proved against both estates, and divi-

(1) *Ex parte Walker*, 4 Ves. 373.

(2) *Ex parte Earle*, 5 Ves. 833. Mr. Christian, in his observations on these cases, (Vol. II. 390.) proposes a different arrangement from either of the plans suggested by Lord Loughborough, namely, that

all cross paper should be proved,—but no cash balance, if the party to whom the balance was due has drawn bills, which have been already proved to the amount of the balance.

**Accommo-  
dation bills.**

dends paid upon them. B.'s assignees applied to prove 498*l.* 10*s.* 4*d.* under A.'s commission, insisting that the 1098*l.* should be deducted from the 6424*l.* 9*s.* 3*d.*, and there would then be that balance due to B.'s estate. Lord Eldon admitted the proof, but held that the assignees of A. were entitled to retain and apply the dividends payable in respect of such proof, for the exoneration of the estate of A. from all the dividends, which it should be obliged to pay in respect of the proof of those (1) dishonored bills so proved against both estates.

**Where  
cash ba-  
lance not  
proveable.**

But where bankers accepted bills for the accommodation of the bankrupt, (who had kept cash with them, and was in the habit of remitting bills to them from time to time to cover the acceptances when they became due) and at the date of the commission the bankers were under acceptances for the bankrupt, and also held bills drawn by the bankrupt, none of which acceptances or bills were due at the time of the bankruptcy, — Lord Eldon held that upon this sort of transaction, the bankers, taking up their own acceptances, were entitled to prove upon the securities they held, but not for the cash balance. (2) And since the operation of the recent provision for the protection of sureties, a new principle has been introduced in the decision of this class of cases relating to cross-paper transactions. So that if A. has accepted bills for the accommodation of B. the bankrupt, and does not pay them when due — or if B. has given A. bills or notes to secure any debt or balance due to him — and any of such acceptances, bills, or notes are afterwards negotiated and proved by the respective holders against B.'s estate, to a larger amount than any cash balance due from B. to A., — such cash balance will not be permitted to be proved under B.'s commission. And notwithstanding A. actually pays any of the bills which have been proved under the commission — all that he

(1) *Ex parte Metcalf*, 11 Ves. 404.

(2) *Ex parte Blaxham*, 8 Ves. 531.

can claim is, to have the benefit of the proof in respect of the particular bills (1) which he is obliged to pay.

If, by giving an acceptance, a debt be constituted, which may be proved under a commission against the acceptor, that is as much a consideration for a bill, as if the value of the bill had actually been paid in money. Thus, where G. and Co., being largely indebted in a drawing account to F. and Co., paid to them a bill, which the latter indorsed to D. and Co.; and then G. and Co., F. and Co., and two other parties to the bill having become bankrupt and insolvent, D. and Co. by proving it under each commission, and receiving a composition from the estate of the insolvent, obtained altogether 20s. in the pound; — it was held, that although G. and Co. were only indebted to F. and Co. in respect of F. and Co.'s acceptances, which were in fact not paid when F. and Co. became bankrupt, yet that the assignees of F. and Co. were entitled to stand in the place of D. and Co., in respect of the proof made by the latter under the commission against one of the other parties to the bill, to the extent of the dividends which had been paid to D. and Co., under F. and Co.'s commission. (2)

Where, by agreement between plaintiffs (bankers at Carlisle) and defendants (bankers at Newcastle), plaintiffs were weekly to send defendants all the notes issued by the defendants, as well as the notes of certain other banking houses, which might come to the plaintiff's hands — and the defendants were in exchange to return to the plaintiffs all their own notes, and the notes of certain other bankers which might come to the defendant's hands, and the deficiency was to be made up by a bill drawn by defendants in favor of plaintiffs at a certain date, — it was held, that the notes so sent by the plaintiffs constituted a debt against defendants, which the latter might pay by a return of notes according to the agreement — but that if they made no such return, or a short return, and gave no bill for the balance,

*Accommodation bills*

An acceptance, which may be proved against the acceptor, a good consideration for a bill, given in exchange.

Proof on special agreement between two banking houses, as to exchange of their respective notes.

(1) *Ex parte Read*, 1 G. & J. 234. (2) *Ex parte Greenwood*, Buck. 237.

*Bills and notes.*

such balance remained as a debt against them, which was proveable by the plaintiffs under a commission issued against the defendants, on an act of bankruptcy committed after the time, when the bill for the balance (if drawn) would have been due and payable. (1)

Bill discounted may be proved in full; so a banker's notes bought in for less than their amount.

The holder of a bill or note, who has discounted it for the previous holder, may prove against any of the parties to the bill for the *full amount*. (2) And, as an assignee or indorsee of a bankrupt's notes, who has bought them in at 10s. in the pound, may take out a commission on such notes (3), — it should seem, that he might equally prove the full amount of them as a general creditor, and receive dividends upon that amount under the commission.

Charges of protest proveable;

The costs and charges of *protesting* bills might formerly be proved under the commission, if they were incurred before the act of bankruptcy; but those incurred afterwards could not be proved. But now, it is apprehended, under the 47th section of the new statute, all such costs are proveable, if they were incurred before the issuing of the commission, and before notice of the bankrupt's insolvency.

and consequential damages occasioned by the law of a foreign state.

And such costs and charges may include the consequential damages which, by the law of a foreign state, the drawer or indorser of a returned bill is obliged to pay beyond the amount of the bill. As, where bills drawn by a trader in Pennsylvania upon the bankrupt in England were protested and returned to the drawer, some for non-acceptance, and others for non-payment — and by a law of that state the drawer or indorser of a bill so returned must pay it with 20 per cent. advance for damages, which the drawer in this case accordingly paid — Lord Camden admitted the drawer to prove the 20 per cent. under the commission, saying, that *that per centage* was part of the original contract; for the nature of the engagement was to pay the bills when due, or the 20 per cent. in addition (according to the law of

(1) *Forster v. Surtees*, 12 East, 605.

(3) *Ex parte Lee*, 1 P. Wms. 782.

(2) *Ex parte Marlar*, 1 Atk. 150.

Pennsylvania) the same as if it had been by express stipulation. (1)

*Bills and notes.*

*Re-exchange*, when it is only the value in sterling money of the bill payable abroad in foreign money, has been held proveable, notwithstanding the value of the foreign money was greater at the time of re-drawing, than at the time of negotiating the bill. (2) But the re-exchange must not include damages and costs, arising upon protest of bills after the issuing of the commission.

*Re-exchange, when proveable.*

With respect to *interest* on bills and notes—the practice was formerly not to allow it to be proved, unless it was expressed in the body of them (3); or unless there was a special agreement or custom of the trade to that effect (4);—the rule in Bankruptcy differing from the rule in Equity in this respect, which allows interest on bills and notes (payable on demand, or on a day certain) to be calculated from the demand, or the day. (5) But now, by the 57th section of the new statute, the holder of any bill or note, which is overdue at the issuing of the commission—though interest is not reserved by it—may, nevertheless, prove for interest upon it up to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon bills or notes. And where a creditor, with whom a bill of exchange had been deposited as a security, first proved his debt against the estate of the drawer (his principal debtor) and thereby, and by other means, reduced his debt to 14l.,—he was held entitled to prove under a commission against the acceptor, not only the 14l. but also all the interest due upon his whole debt up to the time of making that proof, for the perfect liquidation of the account, in respect of which he held the bill as a security. (6) Where

*Interest on bills now proveable.*

(1) *Branch v. Rucker*, Amb. 672.

(2) *Ex parte Hoffman*, C. B. L. 173.

(3) *Ex parte Marler*, 1 Atk. 151. *Ex parte Cocks*, 1 Rose, 317. *Ex parte Champion*, 3 Bro. 436.

(4) *Ex parte Hankey*, 3 Bro. 504.

*Ex parte Mills*, 2 Ves. 295. *Ex parte Williams*, 1 Rose, 399.

(5) *Lowndes v. Collins*, 17 Ves.

87. *Ex parte Kock*, 1 V. & B. 342.

*Ex parte Cocks*, 1 Rose, 317.

(6) *Ex parte Martin*, 1 Rose, 87.

*Bills and notes.*

a bill is drawn payable at a given time after date for a specified sum, "with lawful interest for the same," interest is to be computed from the *date* of the bill. (1)

## SECTION XVI.

### *Policies of Insurance.*

Insured may prove, though loss happens after the commission.

Agent may prove, where insured abroad.

Life insurances.

Insurance on foreign property not prove-

Formerly all debts which might become due and payable on *policies of insurance*, or *bottomry* and *respondentia bonds*, being (as such debts are) contingent in their nature, were not proveable under a commission of bankrupt, unless the contingency had happened before the act of bankruptcy. Relief was first afforded to creditors holding these securities by the 19 Geo. 2. c. 32. s. 2. which enabled them first to make a claim, and afterwards prove when the contingency took effect. The 53d section of the new statute adopts that provision, declaring that the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, made upon good and valuable consideration, shall be so admitted to claim, and after the loss to prove his debt or demand, and receive dividends, as if the loss or contingency had happened before the issuing of the commission against the obligor or insurer. And the person, also, who effects the policy, may prove for any loss, though not beneficially interested in the ship or goods, in case the person really interested is out of the realm. (2)

Insurances upon lives are within this enactment; for, though they are not expressly mentioned, the enacting words are sufficient to comprehend them. (3)

A debt upon a policy of insurance on *foreign* property, though the policy is effected during peace, yet where the loss happens by capture by any British or co-belligerent

(1) *Doman v. Dibden*, 1 Ry. & M. 381.

(2) This last provision is taken from the 49 G. 3. c. 121. s. 16.

(3) *Cox v. Liotard*, Doug. 166.



vessel, after the commencement of hostilities, is not prove-  
able — not even after the return of peace (1); for every in-  
surance on *alien* property by a British subject must be  
understood, with this implied exception, that it shall not  
extend to cover *any* loss *during the existence* of hostilities  
between the respective countries of the assured and  
assurers.

*Policies of  
insurance.*

able, if loss  
by British  
capture.

## SECTION XVII.

### *Rent.*

A landlord having a general right to distrain goods for  
rent, as long as they remain on the premises for which the  
rent is due — neither the issuing a commission of bankrupt  
against the tenant, nor the messenger's possession of his  
goods, will prevent him from exercising that right. But  
by *section 74.* of the new statute, the landlord cannot now,  
after the act of bankruptcy, distrain for more than *one*  
*year's rent*, — and that must have become due before the date  
of the commission. If more than a year's rent, therefore,  
is due to him, he can only prove for the residue; the law,  
in this respect, putting him now upon the same footing, in  
Bankruptcy, as when his tenant's goods are seized by the  
sheriff under an execution, in which case he is only en-  
titled to a year's rent out of the goods so seized. (2) As  
long, however, as the goods continue *on* the premises,  
whether before or after assignment to the assignees, or  
even after the assignees have sold them, the landlord will  
be entitled to distrain for the whole year's rent. (3)

Landlord  
can only  
distrain  
for one  
year's rent,  
after act  
of bank-  
ruptcy.

But in a case, where the landlord proved the amount of  
the rent due to him under the commission, and permitted  
the assignees to sell the goods to a third person, who

After prov-  
ing for the  
rent, and  
lying by

(1) *Ex parte Lee*, 4 Mont. B. L. App. 13. 13 Ves. 64. *Brandon v. Carrig*, 4 East, 410. (3) *Ex parte Plummer*, 1 Atk. 103. *Ex parte Jacques*, 1 Atk. 104. *Ex parte Dillon*, *ibid.*  
(3) 9 Ann. c. 14.

Rent.  
 for three  
 years, can-  
 not after-  
 wards  
 distrain.

thereupon took possession of them, and resided on the premises — and the landlord, three years after proving his debt, distrained upon the goods as being still upon the premises, — Lord Hardwicke, after great consideration, determined, that the vendee of the goods was entitled to retain them; and confined the landlord to his remedy under the commission. (1) And indeed it should seem now, under the equitable construction of the 59th section of the new statute, (which declares that the proving or claiming a debt by a creditor shall be an election to take the benefit of the commission, with respect to the debt so proved) that whenever the landlord had once proved or claimed the amount of his rent under the commission, his doing so would be deemed equally an election, and would amount to a waiver of his remedy by distress.

When  
 goods  
 taken off  
 the pre-  
 mises,  
 landlord  
 cannot  
 distrain,

Whenever the goods are taken off the premises, after being sold by the assignees, the landlord then loses his remedy altogether by distress, and can only come in under the commission *pro rata* with the rest of the creditors. (2) And in one case, though he had in fact distrained before the bankruptcy, but the tenant had replevied the goods, and the replevin cause was pending at the time of the bankruptcy, the landlord was held to have lost his lien. (3) Nor, when the goods are once actually removed, is the landlord entitled to a lien for a year's rent under any equity of the statute, which gives the landlord a year's rent in the case of an execution (4); for a commission of bankrupt is not an execution within the meaning of that statute. (5) Therefore, where a sheriff seized and sold goods under an execution after an act of bankruptcy, it was held, that he was not entitled, out of the produce of the sale, to retain for a year's rent which he had paid to the landlord, unless he could show that such payment was

(1) *Ex parte Grove*, 1 Atk. 103.

(2) *Ex parte Descharmes*, 1 Atk. 103. *Ex parte Grove*, *ibid*.

(3) *Bradyll v. Ball*, 1 Bro. 427.

(4) *Ex parte Devine*, C. B. L. 177.; but see 2 Bl. Com. 487. *contra*.

(5) *Lee v. Lopes*, 15 East, 230.

made without notice of the commission. (1) But in an action by the landlord against the sheriff for not paying a year's rent, it was held by the Court of Exchequer to be no answer, that the tenant was bankrupt when the execution was executed, and that the goods were therefore no longer his property, but that of the assignees, — and that the sheriff ought not to be liable both to the assignees and the landlord. (2) If the goods however are fraudulently or clandestinely removed by the assignees to avoid a distress for rent, then the landlord has a right, under the 11 Geo. 2. c. 19. s. 1., to follow the goods, and distrain them wherever he may find them, within thirty days after their removal.

Rent.

---

except  
when frau-  
dulently  
removed.

But, unless a landlord *actually distrain* the goods of his tenant, he can have no *lien* on them whatever for his rent, though as long as they do continue on the premises, he has still the *right* to distrain. When it is said, therefore, that a mortgagee of a bankrupt's leasehold estate, who pays the arrears of rent due to the bankrupt's landlord, may apply to the Court for an order, that he may stand in the place of the landlord with respect to his right to distrain (3), — that can only have reference to a case, where the arrears have been paid upon a *distress already made* by the landlord, — or at least, where there are goods still remaining on the premises for the landlord to distrain.

But land-  
lord has  
no lien,  
unless he  
*actually*  
*distrain*.

Though a landlord cannot in general distrain until the rent becomes due, yet, if the agreement be otherwise, or there is a custom of the country to the contrary, there is no objection to it in point of law. Therefore where a bankrupt (who had previously committed an act of bankruptcy) took a shop, and agreed to pay half a year's rent in advance, and by the custom of the country also that proportion of rent was payable on the day on which the tenant entered, — the landlord was held entitled, before the first half year expired, to distrain the goods on the premises for half a year's rent; and the landlord having in fact

Landlord  
may by  
special  
agreement,  
or the cus-  
tom of the  
country,  
distrain  
for rent in  
advance.

(1) Ibid.

(3) 1 Atk. 103.

(2) *Duck v. Braddy*, 13 Pri. 455.

**Rent.**

bought the bankrupt's goods at the sale under the commission, it was also held, that he had a right to retain the amount of the rent out of the purchase money (1) due to the assignees. In this case, though there was no actual distress, — yet, the landlord being in possession of the goods as a purchaser, it was considered that he had the remedy of distress in his own hands, by preventing the goods (as purchaser) from being removed off the premises, until he chose to exercise his rights as landlord. (2)

Where bailiff distraining embezzles the surplus, and becomes bankrupt, tenant can only prove for the amount.

On a distress for rent, goods were sold producing a surplus after satisfaction of the rent, which surplus remained in the hands of the bailiff, who afterwards became bankrupt. The tenant died, and his executor claimed this money of the assignees, in preference to the other creditors of the bankrupt. But it was held that, as the bailiff had embezzled the money, the executor must come in with the rest of the creditors (3), though, if any thing had remained *in specie*, the case might have been different.

Assignees of a bankrupt lessee must elect whether they will take the lease.

In order to protect landlords from any loss of future rent accruing after the bankruptcy of their tenants, it is enacted by the 75th section of the new statute, that if the assignees of a bankrupt, who is possessed of leasehold premises, shall not, upon being required by the landlord, elect whether they will accept or decline the lease, the landlord may apply, by petition to the Lord Chancellor, for an order that they shall so elect — and in case they shall decline the lease, then that the lease and the possession of the premises may be delivered up to the landlord.

For further information on this head, the reader is referred to that part of the following chapter (4) which treats of the duty of the assignees in collecting the bankrupt's property.

(1) *Buckley v. Taylor*, 2 T. R. 600.

(2) It might, however, (as Mr. Christian suggests, Vol. II. 510.) have been contended in this case with some reason, that the fact of the landlord purchasing the goods

under the commission, was rather an abandonment of his right to distrain, than an assertion of it.

(3) *Ex parte Dobson*, 7 Vin. Ab. 74.

(4) Post, Ch. X.

## SECTION XVIII.

*Interest.*

The rule in Bankruptcy as to the proof of interest is, that none is proveable but what arises by *contract*; for if there be no contract, interest is then only matter of damages, and is given as such merely in an action at law. When, indeed, interest is part of the contract, it is then as much a debt as the principal; but where it is matter of damages, — as damages not liquidated cannot be proved under the commission, so neither can interest in the shape of damages. (1) And this principle has been recognized, as well in the event of a surplus (2), as in the case of proof.

Interest only proveable when arising by contract.

But, whether the contract to pay interest is *express*, or *implied*, the creditor is in either case entitled to interest at law upon his debt, — and the contract may be collected either from the agreement between the parties, from the nature of their dealings with each other, or from the usage and custom of trade, as applicable to the particular transactions that have passed between them. (3)

How contract to pay it evidenced.

Interest on *bills of exchange and promissory notes* was (as we have already seen) (4) before the present statute not proveable, unless the bill or note bore interest on the face of it; but it is now proveable down to the date of the commission.

Interest on bills and notes,

A *specialty creditor* cannot have interest calculated, so as to exceed with the principal the amount of the penalty (5) contained in his security.

not allowed beyond penalty.

(1) Ex parte *Ferneaux*, 2 Cox, 819.; and see post. "Damages."

(2) Ex parte *Champion*, 3 Bro. 436. Ex parte *Hankey*, *ibid.* 504. Ex parte *Mills*, 2 Ves. 295.

(3) *Ibid.* Ex parte *Boyd*, 1 G. & J. 284.

(4) Ante, 263.

(5) *Bromley v. Goodere*, 1 Atk. 80. Ex parte *Mills*, 2 Ves. 301: *Tew v. Earl of Winterton*, 3 Bro. 489. *Knight v. Maclean*, *ibid.* 495.

**Interest.**

Depository  
not charge-  
able.

Com-  
pound in-  
terest not  
allowed,

except on  
a contract  
to pay it.

Interest  
only  
proveable  
up to date  
of com-  
mission.

A mere *depository* is not in general chargeable with interest, unless he has himself made interest of the property deposited. (1)

Interest upon interest, that is, *compound interest*, is not commonly allowed (2); though it is said, that in the dealings of merchants, where there are regular accounts settled from time to time, and a sum for interest debited and allowed by either party, interest upon interest is then admitted to be proved, on the ground of an original contract to pay it; and that the settling accounts in that way is evidence of an original contract. And in a case where an executor became bankrupt, and the testator had directed the property to *accumulate*, Lord Eldon charged the estate with interest at 5 per cent. with rests, on the principle of an *implied contract* to pay such interest, in respect of the trust imposed upon him. (3)

But no creditor is allowed to prove for interest, calculated to a period lower than the date of the commission (4); though in one case (which was, however, under a special act of parliament (5)) proof of interest subsequent to the commission was allowed, on a claim by certain commissioners appointed under that act; and as proof for interest after the commission cannot be made directly, so neither can it be indirectly thrown upon the estate, except, indeed, in the event of a surplus. (6) Thus, if a mortgagee, after sale of the mortgaged premises, applies to prove the residue of his debt, he is only entitled to prove for interest up to the date of the commission (7): though if the estate mortgaged is sufficient to answer the principal and interest, the assignees cannot in that case redeem without paying interest to the

(1) *Bromley v. Child*, 1 Atk. 259. Ex parte *Bennet*, 2 Atk. 527.

(2) Ex parte *Morris*, 1 Ves. 132. 14 Ves. 573.

*Bromley v. Goodere*, supra. *Waring v. Cunliffe*, 1 Ves. 99.

(3) *Dornford v. Dornford*, 12 Ves. 127.

(4) *Bromley v. Goodere*, supra.

(5) 51 G. 3. c. 15.

(6) Ex parte *Paton*, 1 G. & J.

332. Ex parte *Gass*, *ibid.* 338. n.

(7) Ex parte *Wardell*, C. B. L.

181. Ex parte *Hercy*, *ibid.* Ex parte *Badger*, 4 Ves. 163.

time of redemption. (1) But, where there was an order for superseding a commission, upon payment by the bankrupt of what should be settled by the Master to be due to the creditors under the commission, Lord Hardwicke held, that the creditors were entitled to interest from the date of the Master's report to the day of payment, —as in the common case of a reference to the Master in a cause to state what is due for principal and interest. (2) Where there is a mutual credit between the bankrupt and the creditor, the computation of interest should be stopped at the same time on both sides of the account.

Interest.

In a case where the creditor had sold goods to the bankrupt, and agreed, if prompt payment were made, to deduct 33 per cent. from the price — but no payment being made at the stated times, the creditor applied to prove the whole charge for the goods, without deducting the 33 per cent., contending, that this was a contract to accelerate payment, rather than to give day of payment, —the Lord Chancellor said, they could not make the debt more than the real price of the goods, and dismissed the petition. (3)

Where creditor agrees to allow discount on prompt payment.

If a surety of the bankrupt pays the debt, and the interest accrued subsequent to the bankruptcy, it has been decided, that he cannot prove such subsequent interest under the commission, but only in the same way as the original (4) creditor.

Surety cannot prove for subsequent interest.

But in case the estate of the bankrupt produces a surplus, after paying 20s. in the pound, then by section 132. of the new statute, the creditors, whose debts are by law entitled to carry interest in the event of a surplus, are first to receive interest on their debts at the rate reserved, or by law payable thereon, to be calculated from the date of the commission. And after such interest shall have been paid, then all other creditors who have proved may receive in-

But if a surplus, such interest allowed to all creditors, subject to certain priorities.

(1) 7 Vin. Ab. 110.

(2) Ex parte *Rooke*, 1 Atk. 244.

(3) Ex parte *Ainsworth*, C. B. L.

191. 4 Ves. 678. S. P. Ex parte *Pigou*, 3 Madd. 136.

(4) Ex parte *Wilson*, 1 Rose, 137.

**Interest.**

As to the rights of the two classes of creditors.

terest on their debts from the date of the commission at the rate of 4 per cent. (1)

The former rules will of course be applicable, as to the right of interest between these two classes of creditors. Thus the holders of bills of exchange—if no interest is reserved upon the face of them, or by express or implied agreement—will be included only in the latter class of creditors, and be postponed until the payment of all interest that may be due to the first class. For the 57th section of the statute, which (as we have seen) (2) allows holders of bills to prove for interest, does not alter the *nature of the agreement* between the holder and the party liable upon the bill, but only gives the holder a right to prove for a demand not proveable before. So, upon the principle that a bond creditor is not entitled to interest beyond the penalty, it will follow, that such a creditor will, to the amount of the penalty of the bond, be entitled to interest with the creditors of the first class, viz. of those whose debts carry interest—and, for any interest beyond the penalty, he will rank with the creditors of the second class. (3)

Additional interest not to diminish bankrupt's allowance.

Separate creditors not entitled to it, till joint creditors paid 20s. in the pound.

This claim, however, of the creditors for additional interest in the event of a surplus, it has been determined, cannot be set up by them so as to diminish the bankrupt's allowance. (4)

Where the commission is a joint one, the creditors of the separate estates are not entitled to such additional interest upon their debts, until the joint creditors have also received 20s. in the pound,—the rule being, that where there is a surplus of the separate estate, that surplus shall not go immediately to pay such interest to the separate creditors, but shall first be applied to make the joint creditors equal

(1) And see *Butcher v. Churchill*, 14 Ves. 573. *Ex parte Hill*, 11 Ves. 654. *Ex parte Boyd*, 1 G. & J. 285. author, to the case of *Tew v. Earl of Winterton*, in his edition of *Brown's Reports*, vol. iii. 489.

(2) Ante, 263.

(3) See *Eden's B.L.* 567. et seq. and a note by the same learned

(4) *Ex parte Morris*, 5 Bro. 79. 1 Ves. 132.; and see post, "Bankrupt's Allowance."



with the separate creditors, as to the principal of their respective debts. (1) And where both joint and separate estates have been paid 20s. in the pound, and there happens to be a debt due from the separate estate to the joint estate, or from the joint estate to the separate estate, — neither the partnership can be admitted a creditor upon the individual partner, nor the individual partner upon the partnership, until all such additional interest is paid to every class of creditors, who have proved debts under the commission. For as the partnership itself, in such a case, or some of the partners, are themselves debtors to the creditors of every class — and as the principle is, that the debtor cannot come in competition with the creditor, — it follows, that neither the partnership, nor any individual partner, can claim a debt from the estate of either one or the other, until all the creditors of each are fully satisfied their demands — which include both the principal and interest of their respective debts. (2)

**Interest.**

Claims of joint, or separate, estate upon each other, not to compete with creditors.

Where the surplus consists of real, as well as of personal estate, the personal estate is first to be applied in payment of interest — and if that is deficient, then the real estate may be resorted to. (3) And it seems, that the commissioners may make the computation of such additional interest, without a previous order of the Court. (4)

Personal estate to be applied before real estate.

A creditor, who has given a receipt in full, or delivered up securities, under a mistaken impression that there would be no surplus, is not thereby barred of his right to interest in the event of a surplus. (5)

As to creditor being barred.

Where a creditor is obliged to petition, in respect of his proof, for payment of a dividend which has been declared under the commission, he will be entitled to interest upon

Where creditor entitled to interest

(1) *Ex parte Boardman*, C.B.L. 184. *Ex parte Clarke*, 4 Ves. 677. *Ex parte Reeve*, 9 Ves. 590. (2) 9 Ves. 588.

(3) *Bromley v. Goodere*, 1 Atk. 81. (4) *Ex parte Morris*, 1 Ves. 152. (5) *Ex parte Decy*, 2 Ball. & B. 77.

*Interest.*  
 on his  
 dividend,

such dividend; and in such a case it was ordered to be computed at the rate of 5 per cent. (1)

## SECTION XIX.

### *Costs.*

(And see ante, "*Judgments*," and post, "*Damages*.")

A plaintiff  
 recovering  
 judgment  
 before  
 bank-  
 ruptcy,  
 may prove  
 for costs,  
 though not  
 taxed.

By section 58. of the new statute, if any plaintiff (2) in any action at Law, or suit in Equity, or petitioner in Bankruptcy, or Lunacy, shall have obtained any judgment, decree, or order, against any person who shall thereafter become bankrupt, for any debt or demand, in respect of which such plaintiff or petitioner shall prove under the commission, he may also prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.

But costs  
 incurred  
 after bank-  
 ruptcy,  
 not prove-  
 able.

But costs incurred AFTER the bankruptcy are not proveable under the commission; though, in actions of *contract*, they are in general discharged by the certificate, by reason that they follow the original debt. So that, if a creditor bring an action against a bankrupt after a commission has issued, he takes the chance of losing his costs, in case the debt should be barred by the certificate. (3)

(1) Ex parte *Loxley*, 1 G. & J. 345.

(2) It will be observed, that this section takes no notice of a judgment obtained by a DEFENDANT in any action or suit; though it was no doubt intended, that the costs of a nonsuit, or a judgment, in the defendant's favour, occurring before the bankruptcy, should be equally proveable with those of a judgment for the plaintiff. The provision contained in this section,

also, as to the proof of costs at law, seems to be wholly unnecessary; for such costs must always be *taxed*, before final judgment is obtained; and were, indeed, always proveable, when judgment was recovered before the bankruptcy. *Gulliver v. Drinkwater*, 2 T. R. 261.

(3) *Willett v. Pringle*, 2 N. R. 190.; and see *Blandford v. Foot*, Cowp. 138. *Lewis v. Piercy*, 1 H. B. 29., and see post, 278.

It was for some time held—and the doctrine was recognized by many decisions (1)—that the judgment in all actions, when signed, related back to the verdict; and that the costs *de incremento* upon the judgment, according to a fair and equitable relation of law, became annexed and consolidated with those assessed by the jury; and might be consequently proved as a debt under the commission, if the verdict was prior to the bankruptcy. The authority of these cases, as far as they related to the right of PROOF, was first doubted by Lord Eldon, in a very learned and comprehensive judgment pronounced by him in a case, where both the verdict and the judgment occurred after the bankruptcy—and in which he decided that, notwithstanding the costs in such a case might be discharged by the certificate, they were, nevertheless, not proveable under the commission. (2) In delivering his opinion upon this occasion, his Lordship intimated that, in the decision of the cases above referred to, (all of which had been cited in the argument) the Courts had not presented to their view, two former decisions of great authority (3), in which a different principle was established. A case was afterwards sent for the opinion of the Court of King's Bench; and, after full consideration of all the previous authorities, that Court finally determined that, although a verdict be obtained *before* an act of bankruptcy, yet, if final judgment be not signed till *afterwards*, the costs could not be proved under a commission. (4) And a similar decision has been since come to on this point by the Court of Common Pleas,—Lord C. J. Gibbs observing, that the question could not be tried better, than by

Costs,   
 ~~Costs can-~~   
 not be   
 proved,   
 where   
 judgment   
 signed   
 after bank-   
 ruptcy,   
 though   
 verdict be   
 before.

(1) *Aylett v. Harford*, 2 Bl. 1317.   
 *Graham v. Benton*, 1 Wils. 41.   
 2 Str. 1196. More accurately re-   
 ported in 14 East, 200. note (a).   
 *Longford v. Ellis*, 1 H. B. 29. note.   
 14 East, 202. note. Ex parte   
 *Simpson*.

(2) Ex parte *Hill*, 11 Ves. 646,   
 (3) Ex parte *Todd*, cited 3 Wils.   
 270. 11 Ves. 651. *Walter v. Sher-*   
 *lock*, cited *ibid*.   
 (4) Ex parte *Charles*, 14 East,   
 197.

**Costs.**

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Except in  
an action  
*ex con-*  
*tractu.*

asking, whether an ACTION can be brought upon a verdict, before judgment is signed. (1)

There is a distinction, however, still taken between a verdict in an action on a *contract*, and a verdict in an action on a *tort* (2); — it having been recently decided by the Vice-Chancellor, that where in an action *ex contractu*, the verdict was before bankruptcy and the judgment afterwards, the costs *de incremento* are incorporated with the existing debt by the verdict, though not ascertained in amount until the judgment — and were, therefore, proveable under a commission; but that *in tort* there is no debt whatever, with which the costs can be incorporated, until the judgment. (3) This distinction, however, does not seem to have been much attended to by the Court of Exchequer in an action for damages on a *tort*, in which a verdict was taken subject to a reference — and in which, though the award was not made, nor the judgment entered up until after the defendant's bankruptcy — it was decided, that both costs and damages could be proved under the commission (4), — a decision, utterly at variance with the principle previously laid down by the Lord Chancellor, and the Courts of King's Bench and Common Pleas, in the previous cases of *ex parte Hill*, *ex parte Charles*, and *Walker v. Barnes*. The judgment, indeed, in this case, though not entered up until after the act of bankruptcy, was *entitled* as of the PREVIOUS term (5), and this *may* probably have been taken into consideration by the Court, though it is not stated as a reason for the judgment; for on no other principle, is it apprehended, can this decision be supported.

(1) *Walker v. Barnes*, 1 Marsh, 346. 5 Taunt. 778.

(2) This distinction appears to have been first acted upon by the present Vice-Chancellor, though it was previously approved of by Lord Eldon in *ex parte Hill*, and was also taken in argument in *Longford v. Ellis*, 1 H. B. 29.

(3) *Ex parte Poucher*, 1 G. & J. 385. *Ex parte Parkinson*, *ibid.* 386. note (a).

(4) *Beeston v. White*, 7 Price, 209.

(5) And see, as to the relation back of a judgment to the first day of the term in which it is signed, the recent case of *ex parte Birch*, 4 B. & C. 880.

A new line of distinction, also, has been lately adopted by the Court of King's Bench, — where it has been holden, that, if the judgment in an action of tort be obtained *before the issuing of the commission*, though not until after the act of bankruptcy, the judgment for both damages and costs may then be proved as a debt *bond fide contracted* before the issuing of the commission, within the meaning of the 46 Geo. 3. c. 135. s. 2., — and, consequently, within the 47th section of the present statute (1), which adopts the same provisions.

Costs.

Where judgment obtained before commission, costs then proveable.

Upon a careful review of all the above cases, the following rules seem to be clearly deducible from them :

Rules deduced from all the cases.

1st. Where the *verdict* is not obtained until *after the act of bankruptcy*, the costs can in no case be proved, whether the action is on a contract, or in tort.

2d. Where the *verdict* is *before the bankruptcy*, and judgment is obtained *before the issuing of the commission* — though not till after the act of bankruptcy — then the costs in actions both of contract, and of tort, may be proved, as a debt contracted before the issuing of the commission, provided the creditor, when judgment was obtained, had no notice of the act of bankruptcy.

3rd. Where the action is on a *contract*, and there is a *verdict before the bankruptcy*, then, although judgment be not obtained until *after the bankruptcy*, and even *after the issuing of the commission*, the costs are proveable, as being consolidated with the original debt by the verdict, though not ascertained until the judgment.

4th. But where the action is in *TORT*, and the *bankruptcy*, as well as the *issuing of the commission*, occur *between the verdict and the judgment* ; — then, as there is no debt whatever with which the costs can be incorporated until the judgment, the costs in this case cannot be proved.

With respect to costs upon a judgment of nonsuit, the statute, as has been already observed (2), is wholly silent,

As to costs upon a nonsuit;

(1) *Robinson v. Vale*, 2 B. & C. 762, 4 Dowl. & R. 430. Ex parte Birch, 4 B. & C. 880.

(2) Ante, page 274. note (2).

Costs.

may be proved, if judgment entered up before commission.

In some cases costs not proveable, though barred by the certificate.

Judgment revived by *sci. fa.*

making no provision whatever for the proof of a *defendant's* costs, whether on a judgment of nonsuit, or judgment after a verdict. It was, indeed, formerly determined, that where the nonsuit was *before the bankruptcy* of the plaintiff, the costs might be proved, though the judgment was not obtained till afterwards — on the ground that the costs related back to the nonsuit (1), by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be only found in two of the cases, which were impugned by Lord Eldon in *ex parte Hill* (2), and which seem to have been overruled by the above case of *ex parte Charles*. And it has been moreover since decided, that where a defendant obtains a *verdict*, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle, that no debt arises in such a case until judgment is signed. (3) But in a subsequent case, where the judgment on a nonsuit was entered up *before the commission* issued against the plaintiff, though not until *after* the act of bankruptcy, the costs were held to be proveable (in conformity with the principle, which governed the Court of King's Bench in the above case of *Robinson v. Vale*) as being a *debt contracted* before the issuing of the commission.

There are several cases, as has been already observed (4), where costs may be discharged by the certificate, and yet not proveable under the commission (5); though formerly the right of proof was considered co-extensive, in every case, with the effect of the certificate. Thus, the costs of all proceedings upon an action of *contract*, which (for want of a previous verdict) cannot be proved, are, nevertheless, barred by the certificate, as following the original debt. (6) So, if a judgment recovered before the bankruptcy be revived by *scire facias* after the bankruptcy, it has been

(1) *Hurst v. Mead*, 5 T.R. 365.  
*Watts v. Hart*, 1 Bos. & P. 154.

(2) 11 Ves. 646.

(3) *Walker v. Barnes*, 5 Taunt.  
 778. 1 Marsh. 546.

(4) *Ante*, 274.

(5) Per Lord Eldon, 11 Ves. 649.

(6) *Ex parte Poucher*, *ante*, 276.

decided, that the bankrupt's certificate delivers him from the costs of the *sci. fa.*, as well as from the original judgment; but it does not follow, that the costs of the *sci. fa.*, which have been incurred by the act of the creditor in reviving the judgment, can be proved (1) under the commission. It has been also decided, where a judgment is obtained *before* the bankruptcy—if the defendant *after* his bankruptcy bring a writ of error to reverse it, and the judgment be affirmed—the costs of the writ of error relate back to the judgment, and are barred by the certificate. (2) But it would seem to follow, in this case, that the costs could likewise be proved; for the plaintiff having in reality, though not effectually, obtained judgment *before the bankruptcy*, the case seems to fall within the above clause of the statute, which enables a plaintiff to prove for the costs incurred in obtaining judgment against any person who shall afterwards become a bankrupt, though not taxed at the time of the bankruptcy; and a judgment of affirmance in error is equivalent to pronouncing judgment (3) in the original action. And where the judgment is not obtained until after the bankruptcy, in an action for a *debt*, and the defendant brings a writ of error which is nonprossed—the defendant being held to be discharged by his certificate from the costs (4)—it is apprehended, that the costs in this case might be likewise proved under the commission; for, the action being on a *contract*, they may be considered as incorporated with the original debt, according to the principle of the foregoing cases; and being incurred, moreover, by the act of the bankrupt, and not by the act of the plaintiff, it would be unreasonable to hold, that the bankrupt should be discharged from them, and the plaintiff be at the same time unable to prove them under the commission. (5)

*Costs.*  
after the  
bank-  
ruptcy.

Quære:  
Where  
defendant  
brings a  
writ of  
error after  
bank-  
ruptcy.

(1) *Phillips v. Brown*, 8 T. R. 282.

(2) *Ibid.*

(3) 3 M. & S. 326.

(4) *Scott v. Ambrose*, *ibid.*

(5) The most consistent rule, as it appears, would be, when the costs are thus occasioned by the

Under the new statute, the costs of a suit in Chancery ~~may not~~ <sup>may not</sup> till after the bankruptcy, though the order for ~~payment~~ <sup>taxation</sup> was made before, could not be proved under a ~~commission~~ <sup>commission</sup>, — it being held that it was the taxation which ~~constituted~~ <sup>constituted</sup> the demand (1), and that that could not relate ~~back~~ <sup>back</sup> to the order. But now, by reference to the above ~~section~~ <sup>section</sup> of the statute, it will be seen, that where the order or decree is obtained before the bankruptcy, the costs of obtaining it may be proved, though not taxed till after the bankruptcy. Whether the words of the section will include the costs of a suit directed to be paid *by an award*, where there is *no order or decree* for the reference, remains to be decided. (2)

***Damages.***

(And see ante, "*Judgments*" and "*Costs*.")

We have  
~~discussed~~  
 various  
 plans, and  
 the  
 result.

Where damages are contingent and uncertain, as in *all* cases of *tort*—and also in *many* cases of a demand founded upon *contract*, as where the damages remain to be inquired into, or where damages *may* only by possibility arise on a stipulation not previously broken—they cannot in either case be proved under a commission. (3) For the 56th section of the act, which we have already considered (4), would not, it is apprehended, meet the last of these cases; that section applying solely to proof of a *debt* (that is, a *sum certain*) payable on a contingency—and not to an *uncertain sum* payable upon an uncertain event.

~~Bankrupt~~ bringing a writ of error ~~after the bankruptcy~~, to hold in that case, that the costs should neither be proveable under the commission, nor discharged by the certificate, as being a debt contracted by the bankrupt after the bankruptcy.

(1) *Ex parte Sineps*, C. B. L.  
195.

(2) See *Rex v. Davis*, 9 East, 518., and *Ex parte Kemstead*, 1 Rose, 149.

(3) *Utterson v. Vernon*, 4 T.R. 571.

(4) Ante, "Contingent Debts."



With respect to cases of *tort* :—damages claimed for an assault and battery (1), or for slander — or even in trespass for mesne profits (2), in which the rent may not be the only measure of damage, — or damages in an action of trover (3), if they are incapable of being liquidated, — can in no case be proved under a commission; for, in each of these cases, the claim of the party amounts in law to nothing more, than an alleged cause of action against the bankrupt — and a jury can only determine the amount of the damages he is entitled to — or whether, in fact, he shall have *any* damages at all. In one case, indeed, it was holden, that damages (though ascertained by the verdict of a jury before the act of bankruptcy) were not proveable, any more than the costs, if final judgment was not signed until after the bankruptcy. (4) But it has been since determined that when the judgment is obtained *before the issuing of the commission*, the damages are then proveable, as constituting a debt *contracted bonâ fide* within the meaning of the 47th section of the statute. (5) And in a very recent case it was holden, that though the judgment was not actually signed until three days *after* the commission issued, yet — as a judgment relates back to the first day of the term in which it is signed, which in this case was before the issuing of the commission — that both damages and costs could be proved. (6)

*Damages.*  
Cases of  
tort.

May be  
proved  
when  
judgment  
before the  
commis-  
sion.

In considering this branch of the subject, there seems to be a distinction, between the right to prove *damages* already ascertained by the verdict of a jury — and the right to prove merely upon the JUDGMENT, or for the costs. For though a judgment is not proveable, nor costs in many cases (7), unless the judgment is obtained before the issuing of the commission, — yet, as a *verdict* is *primâ facie* evidence of a

Semble,  
damages  
may be  
proved,  
when *ver-  
dict only*  
before  
bank-  
ruptcy.

(1) *Walter v. Sherlock*, 3 Wils. 272.

(4) *Buss v. Gilbert*, 2 M. & S. 70.

(2) *Goodtitle v. North*, Doug. 562.

(5) *Robinson v. Vale*, 2 B. & C. 762. 4 Dowl. & R. 430.

(3) *Parker v. Norton*, 6 T. R. 695.

(6) *Ex parte Birch*, 4 B. & C. 880.

(7) *Ante*, 275.

Damages.

debt (1), and is, at least, a guide to the commissioners to measure the amount of the damages which the creditor claims, it should seem, that when proof is offered merely for *damages* (without any claim for costs) by reason of a *verdict* before the bankruptcy, the commissioners in such a case have a discretionary power to inquire into the propriety of the verdict, and to admit the creditor to prove for such damages, provided they are satisfied of the justice of his claim. (2) For it is the *uncertainty* only of the amount of the damages, which prevents their being proved under a commission; a reason which no longer holds, when they are already liquidated and ascertained. Thus, where an action was brought for the seduction of the plaintiff's daughter, and was compromised before judgment by the defendant giving the plaintiff two promissory notes in satisfaction of the damages,—it was held, that the notes were proveable under a commission against the defendant, as being liquidated damages assessed between the parties. (3) So, even in an action of trover, if the demand can be liquidated, it can be proved. (4)

Where creditor may waive the tort and bring money had and received, may prove.

In all cases, too, where a creditor, having a right of action for a TORT, is entitled to waive the tort and bring an action as for money had and received, or upon a contract for a given sum, he may prove his demand (5) under a commission. Therefore, where goods have been paid for, but not delivered by the bankrupt (6) according to agreement; or where money is levied by the sale of goods under an execution which is afterwards set aside (7); or where a bill of exchange, having been entrusted to the bankrupt to receive payment when due, is discounted by him, and the proceeds applied to his own use (8); or where the bankrupt pledges a debenture for a debt of his own, which had been de-

(1) Per Lord Eldon, 1 Rose, 195.

(2) Ibid.

(3) Ex parte *Mumford*, 15 Ves. 548.  
290.

(4) Per Buller J. Doug. 168.

(5) *Wright v. Hunter*, 1 East, 30.

(6) *Utterson v. Vernon*, 3 T.R.

(7) Ibid.

(8) *Parker v. Norton*, supra.

posited with him for a special purpose (1); or where money is embezzled by a bailiff upon a sale of goods under a distress for rent (2); — in all these cases, as the amount of the creditor's demand against the bankrupt is capable of being ascertained without the intervention of a jury, and the creditor can *safely swear* to it, he is entitled to prove it under the commission. But if the creditor, in any of these cases, insists upon his claim for the *consequential damage* arising from the tortious act of the bankrupt, then he cannot be admitted to prove; for the damages so claimed are uncertain and contingent, and can only be estimated by a jury.

In regard to claims founded upon *contract*, such as a demand either for goods sold, or for work and labour — where there is no agreement as to the price, and which would be recoverable at law in an action on a *quantum meruit* — the demand, though sounding in damages, can be proved, because it can be easily ascertained, and the creditor can have no difficulty in swearing to the amount. So where a bond (as we have before seen (3)) is given to replace stock on a *certain day*, and the bond is forfeited before the bankruptcy, the damages for not replacing the stock can be proved, because they can be easily estimated, — the amount proveable in this case, being the value of the stock at the date of the commission, together with the amount of the dividends receivable before the bankruptcy. (4) And where navy bills were deposited with a firm, who gave an accountable receipt for them, and one of the firm became bankrupt, the owner of the bills was held entitled to prove for the value of them on the day of the deposit. (5) Not only, indeed, may the creditor prove his demand against the bankrupt in any of these cases, but he is now in fact compelled to do so, with a view to his

*Damages.*

Claims founded on a contract, though sounding in damages, proveable, where amount easily ascertained. Bond to replace stock.

Accountable receipt for navy bills.

(1) *Johnson v. Spiller*, Doug. 167.

(2) *Ex parte Dobson*, 7 Vin. Ab. 74.

(3) *Ante*, 236.

(4) *Ex parte Leitch*, C. B. L. 149.; and see *ante*, 236.

(5) *Bromley v. Child*, 1 Atk. 258.

Damages. own security; for all such demands arising from any breach of *contract*, which can with any certainty be liquidated, are discharged when the bankrupt obtains his certificate. (1)

But not  
proveable  
where  
damages  
uncertain.

But unliquidated damages, though arising on a *contract*, cannot be proved, if there is any *uncertainty* in the mode of estimating them. Thus damages sustained from a breach of covenant, in not building a certain number of houses within a given time (2), in not having full power and authority to sell a ship (3), or in not indemnifying the assignor of a lease from the covenants contained in it (4), have been in each of these cases held not proveable under a commission. For in all such cases a variety of circumstances must be taken into consideration, which may either increase, or mitigate, or even sometimes altogether excuse the damages, and which it is the peculiar province of a jury to determine. And where there is even a *penalty*, or specific sum of money made payable in a bond of indemnity, or covenant to secure performance — as upon a covenant in a lease not to plough up ancient meadow — the penalty, it has been held, cannot be proved as a debt; as it is not the *measure*, but *only limits the extent*, of the damages to be claimed in case of a breach. (5)

(1) *Forster v. Surtees*, 12 East, 605.

(2) *Bannister v. Scott*, 6 T. R. 489.

(3) *Hammond v. Toulmin*, 7 T. R. 612.

(4) *Mayor v. Steward*, 4 Burr. 3439. *Ludford v. Barber*, 1 T. R. 86. *Auriol v. Mills*, 1 H. B. 433. 4 T. R. 94.

(5) 3 Wils. 270.

## SECTION XXI.

*Sureties.*

1. *As to the Rights of a Creditor against the Bankrupt Surety.*
2. *As to the Rights of the Solvent Surety against the Bankrupt Debtor, or Co-Surety.*

1. *As to the Rights of the Creditor against the Bankrupt Surety.*

Where a surety has become bankrupt, the right of the creditor to prove under the commission has been considered to depend upon, whether the engagement of the surety was absolute, or conditional, at the time of the bankruptcy. For the 49 Geo. 3. c. 121. s. 8. which gave relief to the surety *as a creditor*, has been held not to apply to cases, where the surety himself becomes bankrupt (1); and there is nothing contained in the corresponding section of the new statute, which alters the law in this respect. Such cases, therefore, must be considered as falling within the rule respecting contingent debts contained in the 56th section of the new statute. (2)

Right to prove against surety, how it depends.

If the engagement of the surety be *absolute*, the creditor has a right of course to prove, independently of the power given by the 56th section — as where the surety enters with the principal into a joint and several bond payable by instalments, and before the first instalment falls due, the surety becomes bankrupt; — for in such a case the surety himself is considered as a principal. (3) But, if in this case the principal, as well as the surety, become bankrupt,

Where the engagement *absolute*, creditor may prove as of course,

deducting what he has already received.

(1) *Ex parte M'Millan*, Buck. 287.

(2) See ante, "*Contingent Debts*."

(3) *Brooks v. Lloyd*, 1 T. R. 17.

*Proof  
against  
sureties.*  
———

and the obligee first proves his whole debt against the principal, and receives a dividend, he must deduct the amount of the dividend, and prove against the surety only for the residue. (1) So, indeed, where the engagement is not decidedly absolute—as where the creditor receives a bill of exchange from a surety, to secure the payment of goods sold to the principal, which are afterwards partly paid for by the principal—the creditor can only prove against the estate of the surety, the sum remaining due for the goods (2), and not the full amount of the bill. And where A., previous to his bankruptcy, guaranteed B. and Co. against any loss, on account of the non-payment of an instalment by certain joint debtors of B. and Co.; and one of the joint debtors becoming bankrupt, B. and Co., under an order for the proof of joint debts under his separate commission, proved the amount of the instalment, and received a dividend,—it was ordered, that the benefit of the future dividends should be sold, and the produce paid to B. and Co.—and that the monies so received by them, together with the amount of the former dividend, should be deducted from the instalment—and that B. and Co. might then prove for the difference under A.'s commission. (3)

When the  
engage-  
ment con-  
tingent,  
cannot be  
proved  
before con-  
tingency.

If the engagement of the surety be only *collateral*, and depending on a contingency, then, unless the contingency has happened before the application to prove, the debt cannot be proved under a commission against him; unless, indeed, it can be considered such a contingent debt, as that a value can be set upon it by the commissioners under the 56th section. It will be advisable, perhaps, to consider some of the decisions on this head, notwithstanding they occurred before the present statute, the better to inquire how far the words of the new enactment as to contingent debts will be applicable to cases of a similar nature.

(1) Ex parte *Wildman*, 1 Atk. 109. 2 Ves. 113. *Master v. Bucknell*, 2 M. & S. 39.

(2) Ex parte *Reader*, Buck. 381.; and see ante, 249.

(3) Ex parte *Reid*, Buck. 239.

Where a surety joined in a bond, conditioned that the principal, his executors, or administrators, should repay the money within twenty days after the expiration of five years, in case he should so long live and enjoy the benefit of the loan; and if he died before, then that his executors, &c., should repay it within three months after his death, — the bond in this case was held not proveable under a commission against the surety, unless there had been a previous forfeiture by the breach of any of the conditions. (1) So, where J. S. agreed to pay a sum of money to A. by instalments, and B. covenanted with A., that in case the said sum, or any instalment thereof, should not be paid to A. at the times, and in the manner, provided for by the articles, B. would upon demand pay to A. the said sum, or so much thereof as should not be paid at the said times, &c. — and no instalment became due until after a commission of bankrupt issued against B. — it was held in this case, that A. could not prove under the commission (2); though now, it is apprehended, under the 56th section of the new statute, he might prove for any instalment *already due*, notwithstanding it did not become due until after the issuing of the commission. So, where a surety, in consideration of a premium, gave a promise in writing to be answerable for the due payment of a note of hand of a third person, and before the note was due became a bankrupt, — it was held, that the creditor was not entitled, upon such an undertaking, to prove the amount of the note under the commission. (3) But if in this case, also, the note had been due, and default had been made in the payment of it before the application to prove it against the surety, the creditor would, under such circumstances, be admitted now to prove it as a contingent debt.

*Proof  
against  
sureties.*

As on a  
bond,

or cove-  
nant,

or agree-  
ment to  
make a  
contin-  
gent pay-  
ment.

Where a man becomes *bail* for another, and before he is fixed, is made a bankrupt — or if he is bail in error, and

As to bail,  
proof can  
now be

(1) *Alsop v. Price*, Doug. 160.

(2) *Hoffham v. Foudrinier*, 5 M. & S. 21.

(3) *Ex parte Adney*, Cowp. 460.;  
and see *ex parte Gardner*, 15 Ves.  
286.

*Proof  
against  
sureties.*

made,  
though  
not fixed  
till after  
bank-  
ruptcy.

Where  
surety dis-  
charged by  
creditor  
taking a  
collateral  
security,  
or com-  
position.

becomes bankrupt before judgment is affirmed — the debt in each of these cases, being contingent at the time of the bankruptcy, could not formerly be proved against him.(1) But now, if judgment be affirmed in error, or the bankrupt be fixed as bail in the action, *before the application to prove*, the time of the bankruptcy would make no difference in the right of proof.

The discharge of the principal debtor is in general a discharge of the surety; and an agreement by the creditor to take a collateral security from another person in full of his demand, operates to the same effect. (2) But the discharge of a surety by the creditor has not the effect of discharging the principal, nor does it operate as a discharge of the co-surety. Therefore, where a promissory note was made by a principal and three sureties, and two of the sureties and the principal became bankrupt, and the holder of the note proved the amount under each commission, and afterwards received a composition of 4s. in the pound from the third surety, — it was held, that this was not a discharge of the maker of this note, or of either of the two other(3) sureties. It is competent also for a creditor, executing a deed of composition with the principal, to reserve his remedy against the surety, by a stipulation to that effect in the deed of composition. (4) And a creditor holding a bill of exchange as a security from three partners, though he takes the notes of one of them as a collateral security, without the knowledge of the other partners, retaining the original security in his hands, does not by so doing discharge the other partners. (5)

On a bond  
for per-  
formance  
of cove-

Where a surety enters into a bond with the principal, conditioned for the performance of covenants in a lease, the surety is still liable, though the principal is discharged

(1) *Hockley v. Merry*, 2 Str. 1043.

(2) *Lewis v. Jones*, 4 B. & C. 506.

(3) *Ex parte Gifford*, 6 Ves. 805.

(4) *Ex parte Carstairs*, Buck. 560. *Ex parte Glendinning*, *ibid.*

517.

(5) *Bedford v. Deakin*, 2 Star.

178.



by bankruptcy and certificate from the covenants contained in it, under the 75th section of the new statute. (1)

It seems to be pretty well settled now, in courts of law at least, that an agreement to pay, or be answerable for, the debt of another must, according to the construction of the 4th section of the statute of frauds (2), not only be in writing, but must also contain the *consideration* for the promise, as well as the promise itself. (3) Some doubts upon this point are reported to have been expressed by Lord Eldon, but they seem to be merely *obiter dicta*, and to have occurred moreover in cases where the consideration did, in fact, sufficiently appear in the agreement. (4) Notwithstanding, also, the attention of the Judges has been especially called to a consideration of these doubts in two subsequent cases, both the Courts of King's Bench and Common Pleas have confirmed the doctrine laid down in *Wain v. Walters*. (5)

**Sureties.**

nants,  
surety still  
liable after  
principal's  
discharge.

## 2. As to the Rights of the Solvent Surety against the Bankrupt Debtor, or Co-surety.

There have been many conflicting decisions respecting the right of the surety to prove a counter-security against the principal debtor, where the surety had not himself been actually obliged to pay the money before the bankruptcy of the principal. At one time (as we have before seen in the case of a bill or note (6)) it was holden, that if he had taken a counter-security, which was payable *absolutely* at a day certain, — then, though the principal had become bankrupt before the counter-security was payable, and before the surety had either paid, or been called upon to pay his engagement to the creditor, the surety was permitted to

When  
surety  
could  
prove a  
counter-  
security.

(1) *Inglis v. Macdougall*, 1 Moore, 595. *Jenkins v. Reynolds*, 3 B. & B. 14.

(2) 29 Car. 2. c. 3.

(4) *Ex parte Minet*, 14 Ves. 190.

(3) *Wain v. Walters*, 5 East, 10. *Ex parte Gardom*, 15 Ves. 286.

*Senders v. Wakefield*, 4 B. & A. (5) 4 B. & A. 595. 3 B. & B. 14.

(6) *Ante*, 256.

*Proof by  
sureties.*

---

prove his counter-security immediately under the commission; upon the principle, that the counter-security was an absolute debt at law, for which there was a sufficient consideration created by the liability of the surety. (1) In subsequent cases it was holden, that the surety could not prove upon such counter-security, unless he had taken up his own bills, or had paid the original debt (if upon bond) — so that the bankrupt's estate, before it was charged with the claim of the surety, might at all events be exonerated from the original debt. (2) But where the counter-security was only conditional, such as a bond to indemnify the surety against his being called upon to pay the money, and there was no breach of the condition before the bankruptcy, it was there held, that the surety could not prove, — as the debt in that case was only contingent. (3) Though at the same time, where the indemnity bond was forfeited *before* the bankruptcy, the surety was then considered entitled to prove his bond, notwithstanding he had paid no part of the sum, for which he had become surety, until after the bankruptcy. (4)

When he  
could not  
prove at  
all.

In all cases, however, where the surety had no counter-security from the principal, or nothing but a mere undertaking of indemnity, it seems to have been the uniform decision of the Courts, that the surety then, though he had made himself absolutely liable for the debt, could not prove under the commission, unless he had actually paid the debt *before the bankruptcy of the principal*; and that any payment after the bankruptcy only gave him a personal remedy against the bankrupt, and did not enable him to prove. And the reason of this was, that there was

(1) *Rolfe v. Caslon*, 2 H. B. 570. Ex parte *Maydwell*, cit. *ibid.* 571. C. B. L. 157. Ex parte *Beaufoy*, *ibid.* 158. Ex parte *Clanricarde*, *ibid.* *Toussaint v. Martinnant*, 2 T. R. 100. *Martin v. Const*, *ibid.* 640. *Hodgson v. Bell*, 7 T. R. 97.

(2) In re *Bowness*, C. B. L. 161. Ex parte *Findon*, *ibid.* 149. Ex parte *Brown*, *ibid.* Ex parte *Walker*, 4 Ves. 385.

(3) *Martin v. Court*, 2 T. R. 640. *Crookshank v. Thomson*, 2 Str. 1160.

(4) Ex parte *Cockshott*, 3 Bro. 502. *Hodgson v. Bell*, *supra*.

no existing debt between the principal and the surety, before the latter had paid the money to the creditor: (1)

*Proof by  
sureties.*

These disabilities were, however, always considered to be a great hardship upon the surety, when he was obliged to pay the money after the bankruptcy of the principal; and, therefore (as has been already observed (2)) the Courts held, in cases when the creditor had already proved under the commission, that the surety had an equitable right to stand in the place of the original creditor, and to receive dividends upon such proof. (3) And if the creditor had not proved, the Court of Chancery would, upon a bill filed by the surety against the creditor, order the latter to prove the debt, upon the surety bringing the amount (4) of it into court. But if the surety had paid the debt after the bankruptcy of the principal, and before the creditor had proved, in that case it could be proved by neither creditor nor surety. (5)

When  
surety  
could  
stand in  
the place  
of the ori-  
ginal cre-  
ditor.

In order to avoid this circuitous mode of sureties obtaining relief, and to put them upon a fair and equitable footing with the other creditors of the bankrupt, it was (as has been before stated under the section relating to bills of exchange (6)) first provided by the 49 G. 3. c. 121. s. 8. — and this provision has been adopted, and somewhat extended in the new statute (7) — that any person, who at the issuing of the commission shall be surety or liable for any debt of the bankrupt, or bail for him either to the sheriff or to the action, and who shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued) may, if the creditor

Surety  
may do so  
now, or  
prove him-  
self,  
though he  
pays the  
money  
after the  
commis-  
sion  
issues.

(1) *Smithson v. Johnson*, Barnes, 123. 11. *Goddard v. Vanderheyden*, 3 Wils. 262. Bl. 794. *Taylor v. Mills*, Cowp. 525. *Paul v. Jones*, 1 T. R. 599. *Kettner v. Raynes*, 1 Bro. 384. *Chilton v. Whiffin*, 3 Wils. 13. *Young v. Hockley*, Bl. 839. 3 Wils. 346. *Vanderheyden v. De Paiba*, 3 Wils. 528. *Heslopson v. Woodbridge*, Doug. 166. Ex parte *Marshall*, 1 Atk. 130. *Brookes v. Rogers*, 1 H. B. 640. *Howis v. Wiggins*, 4 T. R. 714.

(2) Ante, 254.

(3) Ex parte *Ryswick*, 9 P. Wms. 89. Ex parte *Marshall*, 1 Atk. 129. Ex parte *Matthews*, 6 Ves. 285. Ex parte *Atkinson*, C. B. L. 210.

(4) *Beardmore v. Cruttenden*, C. B. L. 211.

(5) Ibid.

(6) Ante, 254.

(7) Section 52

Proof by  
sureties.

shall have proved his debt under the commission, stand in the place of the creditor as to the dividends, as well as to *all other rights under the commission which the creditor possessed, or would be entitled to in respect of such proof* (1); — or, if the creditor shall not have proved, then the surety, or person liable, or bail, may prove his demand in respect of such payment as a debt under the commission, (not disturbing the former dividends) and may receive dividends with the other creditors, although he may have become surety, bail, or liable as aforesaid, after an act of bankruptcy committed by the bankrupt; provided that when he became so he had no notice of any act of bankruptcy.

Bail have  
the same  
privilege.

This section, it will be perceived, extends the right of proof to *bail*, who were held not to be included in the provisions of the 49 G. 3. c. 121. (2) With that exception, therefore, all the cases determined under the 8th section of that statute will be applicable to the construction of the corresponding section of the new act.

How far  
surety  
bound by  
proof of  
creditor,  
or com-  
pelled to  
prove.

From the wording of the above section, it would seem that the provision is intended more for the benefit of the surety, than that of the bankrupt; as it *enables* the surety merely, and does not *compel* him, either to prove himself, or to stand in the place of the creditor who has proved, and receive the dividends upon his proof. And the case of *Mead v. Braham* (3) favours this construction, in which it was held, that the surety was not bound by the proof of the creditor. But where the surety receives dividends on the proof of the creditor, there he is estopped from proceeding afterwards against the bankrupt. Therefore, where a bill of exchange accepted by the bankrupt had been proved by an indorsee under the commission, who afterwards received the amount from the drawer, and the drawer then received a dividend upon the proof, and afterwards arrested the

(1) The words in italics, are not in the 49 G. 3.

(2) *Hawes v. Mott*, 6 Taunt. 329. 2 Marsh, 192. *Newington v. Keys*, 4 B. & A. 495

(3) 2 M. & S. 91.; and see ante, 152., and *Townsend v. Downing*, 14 East, 565.

bankrupt (who had not obtained his certificate) for the balance; — the Lord Chancellor, upon the petition of the bankrupt, ordered that he should be discharged out of custody at the suit of the drawer. (1) And, as the certificate now releases the bankrupt from all claims and demands made *proveable* under the commission (2), it follows, that the above section is so far compulsory on the surety, that in all cases where he *might* have proved against the bankrupt, the certificate will be a bar to any action brought afterwards by the surety.

*Proof by  
sureties.*

Having already fully considered the right of proof by sureties on bills and notes (3), as well as that of sureties for the payment of annuities (4), it will be sufficient on the present occasion to confine our attention to those cases, which involve the rights of sureties on *other instruments*.

Where a surety joined in a bond to a banker for 10,000*l.*, for payment within two months after notice of every sum of money, which the obligee should at any time pay or advance on account of the principal, by payment of or discounting drafts, bills, &c. — and the principal conveyed an estate to the surety as an indemnity, and afterwards became a bankrupt — upon which the obligee proved under the commission a debt of 20,000*l.* due from the bankrupt upon the balance of the standing account; — the surety in this case, upon payment of the 10,000*l.*, was held entitled to the benefit of such proof, to the amount of the difference between the 10,000*l.*, and the value of the proceeds of the sale of the estate. (5) So, where a surety had entered into a bond to the king, for the payment by the bankrupt of the duties received by him as distributor of stamps, and after the bankrupt had obtained his certificate, the surety was obliged to pay a sum of money due to the crown; — it

Surety by bond entitled to obligee's proof to the extent of balance unsatisfied by a counter-security.

Surety in a bond to the king for stamp duties, may prove.

(1) *Ex parte Lobbon*, 17 Ves. 334.

(2) *Section 121.*; and see *Van-  
sanden v. Corbie*, 8 Taunt. 550.  
2 Moore, 602. 3 B. & A. 13, *West-  
cott v. Hodges*, 5 B. & A. 12.

(3) See ante, 253. et seq.

(4) Ante, 231.

(5) *Ex parte Rushforth*, 10 Ves. 409.

*Proof by  
sureties.*

was held, that the surety could not sue the bankrupt for the amount so paid, as he might have proved it under his commission. (1) In this case it was urged, that the statute did not contemplate the case of a surety in a bond to the king, but only to a common creditor, who might, or might not, prove under the commission; whereas there was no instance of the *crown* proving under a commission: but the Court decided that, in order to bring the case within the statute, it was not necessary that the principal creditor should be enabled to prove, or that the bankrupt should be discharged by his certificate if he does not prove; and that the case did not differ from that of a surety in a bond to a private person. (2)

*Surety, en-  
titled to  
the rights  
of the cre-  
ditor, in  
respect of  
the cer-  
tificate, as  
well as of  
the di-  
vidends.*

A surety, paying the debt after proof by the creditor, is not only entitled to stand in the place of the creditor in respect of the dividends on the proof, but also in respect of his right as to the bankrupt's certificate. (3) This decision, which was upon the construction of the 40 G. 3. c. 121. s. 8., is still more fortified by the additional words introduced into the above section of the new statute, which expressly declares, that the surety in such a case shall be entitled to stand in the place of the creditor as to the dividends, and *all other rights under the commission*, which the creditor possessed or would be entitled to in respect of such proof.

*Surety for  
rent not  
due at the  
bank-  
ruptcy, not  
within the  
above  
section.*

It has been determined, that a surety for the payment of *rent* by a bankrupt to his landlord, where there is no rent due at the time of the bankruptcy, is not within the terms of the above section, which relates only to securities for debts of the bankrupt due *at the time of issuing the commission*; and, therefore, where a surety in such a case was obliged to pay for three years' rent, which became due *after* the bankruptcy, it was held, that he might sue the bankrupt to recover it (4), notwithstanding his certificate.

(1) *Westcott v. Hodges*, 5 B. & A. 12.

(2) *Ibid.*

(3) *Ex parte Gee*, 1 G. & J. 330.

(4) *M'Dougal v. Paton*, 2 Moore, 644. 8 Taunt. 584. Mr. Eden, in

The statute, also, only applies to cases where the surety has paid the *whole debt*, or part in discharge of the whole; and not where he merely pays part in discharge of his own personal liability. Therefore, where a surety in a warrant of attorney, in order to discharge himself, paid part of the debt remaining due to the creditor (who had previously proved under the commission), and thereupon satisfaction was entered upon the record, — it was held, that as this was not a *payment of part of a debt in discharge of the whole*, he could not stand in the place of the creditor who had previously proved. (1) If a surety, also, should after the bankruptcy of the principal, besides the debt, pay the *interest* accrued thereon *subsequent to the bankruptcy*, he will not be permitted to prove such subsequent interest; for all that is contemplated by the above enactment is, that the surety may prove as the principal creditor. (2)

*Proof by sureties.*

Nor a surety paying only PART of the debt.

Cannot prove for interest since the bankruptcy.

If a surety in a bond for a bankrupt, after the bankrupt obtains his certificate, joins with him in a new bond to the representatives of the creditor, and the old bond is de-

Nor when he joins in a fresh bond after

his *Treatise on the Bankrupt Law*, page 151. suggests, whether a case like the above would not be varied now, by the provision as to contingent debts, contained in the 56th section of the new statute. But it is submitted, that unless the surety has entered into a *bond*, or other *specialty*, to the lessor for the payment of the rent, the *mere liability* to pay it (in respect of which a debt may only by possibility be created) cannot be considered as a *debt already contracted payable on a contingency*, so as to bring it within the 56th section. Nor does the case, indeed — even if a bond were given by the surety — appear to come within the meaning of that section; which enables the commissioners to *set a value* upon the debt, *before the contingency happens*, and to admit the creditor to prove for the amount. For, unless the lessor (which would seem a very preposterous case) could have a value set upon the

WHOLE *future rent* reserved in a lease to the bankrupt, and be permitted to prove the amount as a contingent debt, — it is apprehended, that a mere surety for the rent, who might never be called upon for a farthing, could still less have a value set upon his *liability*, and prove for the amount. And — if he cannot have a *value set* upon his liability — he cannot prove, *when* the contingency happens, and he is actually obliged to pay the rent; for the statute only enables the party to prove after the contingency, “in respect of such debt,” previously mentioned in the section, — that is, such a debt as the commissioners can set a value upon before the contingency happens. See also the following case.

(1) *Soutten v. Soutten*, 5 B. & A. 852.

(2) *Ex parte Wilson*, 1 Rose, 137. *Ex parte Houston*, 2 G. & J. 56.

*Proof by  
sureties.*

bankrupt's  
certificate.

Whether  
the substi-  
tution by  
a co-surety  
of a differ-  
ent instru-  
ment gives  
him a claim  
against the  
other co-  
surety.

livered up to the surety, this is not equivalent to payment by the surety, so as to enable him to prove under the commission; for the transaction amounts to an entire release of the old debt by the obligee, and the surety stands afterwards in quite a different character, being no longer surety for the bankrupt's estate, but for a new obligation created subsequent to the certificate. (1)

It was decided by the late Vice-Chancellor, that the substitution by one co-surety, without the knowledge of the other, of a different security, in the place of that on which they were severally liable, does not give such co-surety any claim against the other, as having paid the debt, for which each was liable on the original instrument. Thus, where R., for the accommodation of C. & Co., drew on J. & Co. a bill, which they accepted — J. & Co. drawing on R. another bill, which he accepted — and both bills were indorsed to C. & Co.; and (J. & Co. before their acceptance fell due having become insolvent) the holders called upon R. as drawer for payment — who thereupon, for the accommodation still of C. & Co., obtained an acceptance of T. in lieu of that given by J. & Co. — and R. proved the amount of such acceptance under a commission against J. & Co.; — Sir J. Leach, under these circumstances, ordered the proof to be expunged, the dividends repaid, and the acceptance delivered up; as he considered, that the new security given by R. was one with which J. & Co. had no concern, and that their estate could not, therefore, be charged with the consequences of it. (2) But Lord Eldon, when this case came before him upon appeal, thought that the question was merely who were sureties, and who were principals, in these *counter-acceptances*; and that R. being the surety (as drawer) for J. & Co., as to those bills drawn by him and accepted by them, the question was to be decided by the general law between acceptors and drawers, when the drawers pay for the acceptors; — and the Vice-Chancellor's order was reversed. (3)

(1) *Ex parte Sergeant*, 1 G. & J. 185. 2 G. & J. 23.

(2) *Ex parte Hunter*, 5 Mad. 165.

(3) *Ex parte Hunter*, 2 G. & J. 7.



Where partners dissolve their partnership,—one partner retiring, and the other continuing the business, and covenanting to pay all the debts, — if the latter becomes bankrupt, and the retiring partner is obliged to pay any of the debts, he can prove such payment under the commission; as he is in the nature of a surety for the continuing partner. (1)

*Sureties.*

A retiring partner in the nature of a surety.

## SECTION XXII.

### *Creditors by Composition.*

Where a creditor agrees with his debtor to take a composition in lien of his debt, on condition that the money is paid on a certain day, and after failure in such payment, the debtor becomes a bankrupt,—the creditor is entitled in that case to prove for the whole of his original debt, or for such part as remains unpaid—and not merely for the amount of the composition. For the general rule in equity is, that the Court will not dispense with the *point of time* in the composition of debts, as they will where it would work a forfeiture; and that where a creditor thus agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails in payment, the latter cannot (2) be released.

Where creditor not bound by composition;

Therefore, where a trader entered into a deed of composition with his creditors, by which they agreed to take 10s. in the pound on their respective debts by instalments, to be secured by his promissory notes, and the creditors covenanted that they would, as soon as such promissory notes should be paid, release and discharge the trader—and the deed also contained a proviso, that in case of default made in such payment, or if any commission should issue before the whole of the composition should be paid, then the covenants, on the part of the creditors whose

and may prove for the residue of his debt remaining unpaid.

(1) *Wood v. Dodgson*, 2 M. & S. 195.; and see post, title "Partners."

(2) *Sewell v. Masson*, 1 Vern. 210. Eq. Ca. Ab. 28. s. 3. *Beathcote v. Crookshanks*, 2 T. R. 24.

Composi-  
tion.

debts should be so unsatisfied, should be null and void — the first instalment was paid, the second was due and unpaid, and a commission having issued against the trader, — Lord Eldon under these circumstances held, that the creditors were entitled to retain the first instalment, and to prove for the residue of their original debts. (1) So, where a trader assigned certain book-debts, in trust to pay the creditors who should execute the deed, and covenanted that if the creditors should not, out of that fund, be paid in full within two years, he would pay the deficiency within a month afterwards — and before the end of the two years the debtor became a bankrupt, — it was held, that the creditors under the deed were entitled to have the remaining debts of the trust fund sold, and the produce divided amongst the creditors under the trust deed, *pari passu*, having regard to what had been already received; and that, after such application of the trust fund, the creditors were entitled to prove for the deficiency under the commission. (2) But if a creditor under a composition has not received his instalments before the bankruptcy takes place, and there is no fund separated for the payment of them, he cannot have them out of the bankrupt's estate, and prove the residue of the debt; but he must then come in as the other creditors (3) at the date of the bankruptcy.

Where he  
cannot  
prove for  
residue.

Where, however, there is an *actual release* of the debt in the composition deed, and no default made before the bankruptcy in the payment of any of the instalments, then the creditor cannot prove for the residue of the original debt, but only for the remaining instalments. As, where a deed of composition stipulated that if the instalments should not be duly and regularly paid, the *release* thereby given by the creditors should be void — and *all* the instalments, which had become *due* before the bankruptcy, were regularly paid; — in this

(1) *Ex parte Verc*, 1 Rose, 281.  
19 Ves. 93.

(2) *Ex parte Richardson*, 14 Ves.  
184.

(3) *Ex parte D'Oliviera*. *Ex*  
*parte Von Hulle*, 14 Ves. 184.

case Lord Eldon held, that the creditor ought not to prove the residue of the debt, but only the outstanding instalments: Composition.  
 for that, as there had been *no default* before the bankruptcy; and the bankrupt had been released from his debts, nothing whatever was then due to the creditor. (1) In a former case, however, where the bankrupt had paid the first instalment — and though the creditor had waived the default in the payment of the second, by accepting two notes of hand which were not due at the time of the bankruptcy, — Lord Hardwicke thought it would be a hard case, if the creditor was not admitted to prove the whole of the remainder of his original debt. (2)

If a creditor, to induce another creditor to come to an arrangement with his debtor by composition, or otherwise, conceals his own debt, holding out that he is no creditor, — Where a party bound by his own misrepresentation.  
 the party is bound by such misrepresentation, and, in case the composition take effect, will be precluded from proving his own debt. (3) But when the proposed composition or arrangement does not take effect, then the party, however fraudulent his intention, will not be bound (4) by such misrepresentation.

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## SECTION XXIII.

### *Friendly Society Act.*

By the 33 Geo. 3. c. 54. s. 10. for the encouragement and relief of friendly societies, it is provided, that if any person appointed to any *office* by any such society, and being entrusted with, or having in his hands or possession, any monies or effects belonging to such society, or any securities relating to the same, shall die, or become a

(1) *Ex parte Peck*, 1 Rose, 435. 1 Anst. 202. *Eastabrook v. Scott*,  
 (2) *Ex parte Bennett*, 2 Atk. 3 Ves. 456. *Holmer v. Viner*, 1 Esp.  
 527. 132. *Ex parte Gardner*, 11 Ves.  
 (3) *Montefiori v. Montefiori*, 244.  
 1 Bl. 363. *Cecil v. Plaistow*, (4) *Ex parte Oakley*, 1 Rose, 138.

*Friendly  
society.*

bankrupt, or insolvent, his executors or administrators, or assignees, shall within forty days after demand made by the order of the society, deliver over all things belonging to such society, to such person as the society shall appoint; and shall pay out of the assets all sums remaining due, which such person received by *virtue of his said office*, before any of his debts are paid or satisfied.

Operation  
of act con-  
fined to  
money  
due from  
*officers* of  
the so-  
ciety, by  
*virtue of*  
*their office.*

In the first cases that were determined under this act, its provisions were construed to extend to *all persons*, who had the property of the society in their hands, although they were *not officers* of the society (1); but, upon a revision of those cases, such a construction was found to be too large, and the statute was afterwards confined to cases where persons were duly and formally appointed *officers* of the society — and was therefore held not to extend to a person, to whom the money of the society has been paid as a banker, or to whom money has been lent by them upon security paying interest. (2) And even *money lent to a treasurer* duly appointed, upon his promissory note, has been held to be not within the operation of the act; for the preference is given by the statute, in respect of money which gets into the hands of the *officers* of the society, only by *virtue of their office*, and independently of contract. (3)

But in a case where money was paid to trustees, AS TRUSTEES, and they gave separate notes for it, and voluntarily agreed to pay interest, for the purpose of serving the society, — it was held, that here, the money being paid to them *as trustees* duly appointed, their agreeing to pay interest did not alter the case, so as to make the money in their hands to be considered only a loan to them in their private character; and the claim under the statute was allowed. (4)

(1) 1 C. B. L. 255.

(2) Ex parte *Askwith*, 1 C. B. L. 255. Ex parte *Amicable Society of Lancaster*, 6 Ves. 98. Ex parte *Ashley*, *ibid.* 441. Ex parte *Corser*, *ibid.* Ex parte *Ross*, *ibid.* 804.

(3) Ex parte *Stamford Friendly Society*, 15 Ves. 280. Ex parte *Buckland*, Buck. 214.

(4) Ex parte *Friendly Society of Wickwar*, Whitmarsh, 297.

## SECTION XXIV.

*Rates and Taxes.*

If the bankrupt's estate is in arrear for rates or taxes, the collector, or assessor, seems to be the proper person to prove the debt; and he ought at the time of proof to produce his appointment, that the commissioners may judge of the legality of it. (1)

Where collector, or assessor, may prove.

But, if the collector himself should become bankrupt, having received the taxes from the inhabitants, but not having paid the money over, one of the inhabitants in that case may be admitted to prove for himself and the rest (2); and the form of his deposition should be, that neither he, nor the rest of the parishioners to his knowledge or belief, have received any security or satisfaction. It makes no difference, with respect to the right to prove against such collector, that the usual time of accounting has not arrived—as in the case of an *overseer*, who becomes bankrupt before the expiration of his year of office, before which he cannot strictly by law be compelled to account;—for the money in his hands is a *debitum in præsenti*, though he may only be accountable for it *in futuro*. (3) Where the bankrupt had been appointed a joint collector with another person, such person (though his co-collector) was permitted to prove for the sum due on the part of the parish. (4)

Where collector bankrupt, then one of the inhabitants.

(1) *Lloyd v. Heathcote*, 2 B. & B. 508. contra, *Rex v. Egginton*, 1 T. 388. 1 C. B. L. 127. 1 Mont. Dig. R. 369.

143.

(2) *Ex parte Child*, 1 Atk. 111.

(4) *Ex parte Muggeridge*, 1 C. B. L. 128. *Ex parte Exleigh*, 6 Ves.

(3) *Rex v. Tucker*, 5 M. & S. 811.

## SECTION XXV.

*Illegal and void Debts.*

No debt, which is either illegal in its nature — as a bond given for the *premium pudoris*; or which is made void by statute — as a debt upon an usurious contract, — can be proved under a commission.

What  
debts not  
illegal.

Where a bond, however, was given by a bankrupt for the payment of a sum of money, in consideration that the obligee would marry a servant of the bankrupt, and maintain a bastard which the bankrupt had by her, and the marriage took effect, — this was held to be a good consideration, and the obligee entitled to prove the bond. (1) So, where promissory notes were given for liquidated damages in compromising an action for the seduction of the plaintiff's daughter, *per quod servitium amisit*, the notes were permitted to be proved under a commission against the maker. (2)

Debts  
tainted  
with usury.

Where a contract is originally *usurious*, it is (with only one exception) void *ab initio*, and cannot be proved by any person claiming benefit under it, notwithstanding he may be neither party, nor privy, to the usury. (3) The exception alluded to is one created by a recent statute (4), by which it is declared, that no bill or note, though given for an usurious consideration, shall be void in the hands of an indorsee for valuable consideration, without notice of the usury. The rule of the Court of Chancery is, when a bill is filed to be relieved against a demand of usurious interest, not to make void the whole debt, but merely the excess of interest, and to compel the party to pay what is really due; but under a commission of Bankruptcy, the

(1) Ex parte *Cottrell*, 2 Camp. 742.

(2) Ex parte *Mumford*, 15 Ves. 289.

(3) *Lowe v. Waller*, Doug. 736.

(4) 58 G. 3. c. 93.

assignees have a right to insist, that the whole is void upon the ground of usury. And, unless the assignees and creditors submit to the proof of what is really due, the Lord Chancellor has not power to order it. (1) Where a creditor also, who had taken out execution, delivered up the proceeds to the assignees, under an express agreement that he should come in with the other creditors for the balance due to him,—it was held, that such agreement meant a *provable* balance, and did not let in the debt, if affected by usury. (2)

*Illegal  
debts.*

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In some cases, however, where by the custom of trade a small per centage more than the legal interest is taken, in the nature of *commission*, on the discounting of bills, and as a reasonable compensation *bonâ fide* for extra trouble,—such a transaction is not considered to be usurious (3); and 10s. per cent. has been held to be not unreasonable in this respect. But commission cannot be added to the amount of legal interest, for the purpose of inducing a loan of money to be made, and of recompensing it afterwards when made; for it must be always considered as an excess beyond legal interest, unless it can be ascribable to trouble and expense *bonâ fide* incurred; therefore, where there is no such trouble or expense, the remuneration cannot legally be claimed. The cases, where such commission can be claimed, are chiefly confined to the dealings of bankers, brokers, and other agents; for any charge above the legal interest by a general trader, and on one single transaction, or by persons who cannot be considered in a mercantile character, would be held a mere shift or cloak for usury. (4)

Where  
by custom  
of trade a  
*reasonable*  
*commis-*  
*sion* taken,  
not usury.

(1) *Ex parte Thompson*, 1 Atk. 125. *Ex parte Skipp*, 2 Ves. 489. 2 T. R. 52. n. *Carstairs v. Stein*, 4 M. & S. 192.

*Benfield v. Solomons*, 9 Ves. 84.

(2) *Ex parte Banglay*, 1 Rose, 168.

(3) *Ex parte Jones*, 17 Ves. 339.

1 Rose, 29. *Ex parte Henson*,

1 Mad. 112. *Winch, q. t. v. Fenn*,

(4) *Kent v. Lowen*, 1 Camp. 178.

*Auriol v. Mills*, 2 T. R. 52. *Ham-*

*mersley v. Yea*, 1 B. & P. 151.

*Masterman v. Cowie*, 3 Camp. 488.

*Baynes v. Fry*, 15 Ves. 120. *Marsh*

*v. Martindale*, 3 B. & P. 154.

**Illegal debts.**

Where money not all advanced on the day from which interest to be paid, usurious.

Where a warrant of attorney was given to secure the repayment of 600*l.*, with interest from a certain day, and the whole of the money was not actually advanced on that day,—it was held, that the transaction was usurious.(1) But an agreement that money borrowed should be repaid to the lender, or left in his hands as a banker, to be drawn out as the borrower wanted it, — then, though the money not being ready at the time when it is applied for by the borrower, would be a breach of the contract, — yet it would not amount to usury. (2)

How Bankruptcy differs from other proceedings, in charging usury.

In making out a charge of usury to defeat a debt in *Bankruptcy*, it seems that, by the practice of the Court, there is a much greater latitude allowed to the party making such charge, than what is permitted in courts either of law, or equity. For, at law, the charge must be supported by strict rules of evidence; and, in equity, the debtor must either prove the usury by legal evidence, or have the confession of the party — and, moreover, cannot apply for relief, without offering to pay what is really due. But in *Bankruptcy*, it is sufficient to suggest usury in a petition supported by affidavits, merely upon information and belief, by which the party charged is in fact compelled to prove against himself; and this proceeding, also, is not for the purpose of giving him his real debt, but with the object of cutting him off from all relief.(3) This practice, which has been more than once forcibly commented upon by Lord Eldon, and which is certainly unreasonable in principle, and frequently oppressive in its effects, does not, however, appear yet to have received any alteration.

Debt from sale of goods to be illegally exported, not proveable.

A debt arising from the sale of goods, bought for the purpose of being sent to India, contrary to the prohibition of an act of parliament, cannot be proved, if the party at the time of the sale knew of their illegal destination.(4)

(1) Ex parte *Banglay*, 1 Rose, 168.

(2) Per Lord Eldon, *ibid.*

(3) Ex parte *Scrivener*, 3 V. & B. 14.

(4) Ex parte *Moggridge*, 1 C. B. L. 187.; and see ex parte *Daniel*, 14 Ves. 191.



So, money advanced, for the furtherance and in execution of any illegal contract, cannot be proved;—as, where one member of a firm was connected with the bankrupt in an insurance partnership (which until lately was illegal (1)), and advanced the money of the firm to the bankrupt on different policies of insurance, and the partner so advancing the money died, — it was held, that the surviving partner of the firm could not prove the amount of such advances under the commission. (2)

*Illegal debts,*  
\_\_\_\_\_

If the consideration, for which a security is given, be good in part, and bad in part, — though the security is void at law, yet in equity, and in proceedings in bankruptcy, it shall stand as to what is good. As, where a broker was employed to effect two insurances — one of which was illegal — and the principal, in consideration of the money laid out by the broker in effecting them, indorsed a bill to him, which was accepted by a third person, who became a bankrupt; — the Lord Chancellor, though he refused to allow the broker to prove against the estate of the acceptor such part of the debt, as arose upon the illegal insurance, held nevertheless that he might prove for the residue. (3) And, where promissory notes were given by a stock-broker for the balance of an account of money advanced to him, to be employed in bargains for stock contrary to the statute of the 7 Geo. 2. c. 8. — and the broker became bankrupt, — upon a petition by the payee to prove the notes under the commission, Lord Erskine allowed proof to be made for sums admitted by the bankrupt to have been received and applied to his own use — but for no part of the amount, that appeared to be made up of the profits arising from the stock-jobbing transactions. (4)

If part of consideration good, and part bad, a security may be proved for the amount of what is good.

It is, however, purely a legal question, whether transactions of this nature are, or are not, an infringement of

Whether an act of parliament

(1) See 5 G. 4. c. 114., by which such partnerships are now made legal.

(2) Ex parte *Bell*, 1 M. & S. 751.

(3) Ex parte *Mather*, 3 Ves. 373.

(4) Ex parte *Bulmer*, 13 Ves. 313.; and see *Grey v. Fowler*, 1 H. B. 462. *Petric v. Hannay*, 3 T. R. 418.

*Illegal debts.*

is infringed, is a question of law.

Where a broker dealing on his own account, renders the debt illegal.

Contract to convey goods to an enemy's country, illegal.

Inadequate consideration.

Voluntary bond.

the act of parliament; and upon a petition to expunge the proof of a debt, which was composed of various sums of money paid by a broker for a bankrupt, in settling differences upon bargains of this description, Lord Eldon said, it ought to be put in a course for the decision of a court of law. (1)

A broker of the city of London, though he gives a bond that he will not deal on his own account, may nevertheless prove a debt arising out of transactions as a merchant, notwithstanding such dealings are in contravention of the rules and stipulations, under which he derives his office; for such rules are not founded on any prohibition of general law, but are only a matter of mere municipal regulation. If, however, the debt arises out of one transaction, in which he acted *both as broker and principal*, it is then void upon principles of common law. (2)

A debt, arising out of a contract to convey British goods to a market in an *enemy's* country, cannot be proved under a commission, notwithstanding peace has even been subsequently established between that country and Great Britain. (3) Though, if the contract had taken place BEFORE the war, it would then revive upon the restoration of peace between the two countries, — the claim of the creditor being, in this case, only suspended by the war. (4) But, in the case of an INSURANCE of foreign property, followed by a war with the country of the assured, a loss incurred by the hostile act of this country cannot (as we have already seen (5)) be recovered upon the return of peace.

*Inadequacy of consideration* is also an objection, which may be made to the proof of a debt under a commission, — as in the case (which has been before put) in treating of the proof of annuities. (6) But a voluntary bond may be

(1) *Ex parte Daniels*, 14 Ves. 71.; post 308, but see 2 Christ. 191. B. L. 287.

(2) *Ex parte Dyster*, 2 Rose, 245. (5) Ante, 264.

(3) *Ex parte Schmaling*, Buck. 93. (6) Ante, 220. *Ex parte Cator*,

(4) *Ex parte Boussmaker*, 15 Ves. 1 Bro. 287.

proved, so that payment of it be postponed until all the other debts are satisfied; after which it may be paid out of the surplus. (1) And a bond, given for the arrears of a voluntary bond, is deemed a bond for valuable consideration; and may be, therefore, proved without this restriction. (2)

## SECTION XXVI.

### *Of claiming a Debt.*

If a creditor cannot ascertain his debt with certainty, Where a creditor may claim. sufficient to enable him to swear to the amount — or where it appears to the commissioners that there is a probable foundation of a demand, though not satisfactorily substantiated — it is usual to suffer a claim of the creditor to be entered on the proceedings. (3) The benefit of this proceeding is, that when a dividend is declared, he has one also reserved upon his claim; and as soon as his debt is ascertained and proved, he is then entitled to receive the dividend, without being obliged to apply to the Lord Chancellor for that purpose. (4)

The claiming a debt is often necessary, where there have been extensive dealings between the creditor and the bankrupt as merchants, and no balance has been struck upon the account current between them at the time of the bankruptcy (5); or where the agent of a creditor, applying to prove on his behalf, cannot at the time produce his authority. It is, also, expressly provided for by the new statute (6), in the case of an obligee in any bottomry, or *respondentia*, bond; and also in that of the assured under a policy of insurance, before the loss or contingency shall have happened.

(1) *Gardner's Assignees v. Skinner*, 2 Sch. & Lef. 228.

(2) *Gillham v. Lock*, 9 Ves. 612.

(3) 1 C. B. L. 255.

(4) Cull. B. L. 160.

(5) *Ex parte Simpson*, 1 Atk. 70.; and see 5 Wils. 271.

(6) Section 53.; and see ante, 264.

**Of claims.**

**When  
claim may  
be struck  
out.**

If the claim, however, is not substantiated in a reasonable time, the commissioners may strike it out; and they generally do so before a dividend is declared, unless sufficient reason is offered to them for its remaining longer on the proceedings; but the creditor is, notwithstanding its erasure, at liberty to prove his debt afterwards, and to receive his share upon any future dividends. And when there have not been gross laches on the part of the creditor, the Lord Chancellor will generally make an order, that the creditor shall be paid his proportion of the former dividend out of what money may be in the hands of the assignees, — so, however, as not to break in upon the rights of the rest of the creditors as to such former dividend.

**Where an  
alien ene-  
my may  
claim.**

Where a debt was due to an alien enemy from the bankrupt, upon a contract *before the war* took place, Lord Erskine ordered a claim to be entered, and the dividend reserved, — holding it contrary to justice to confiscate the dividend in such a case; for that as the contract was originally good, the right to recover it was only suspended by the war, and would revive upon the restoration of peace. (1)

**How claim  
operates,  
as notice  
of dissent  
from an  
illegal con-  
tract.**

A claim to prove a premium on an illegal insurance, or wager, made with a bankrupt, has been held to be a sufficient notice on the part of the claimant, that his intention is to rescind the contract. Therefore, where after such a claim was made, the commission was superseded, — the party was held entitled to recover back the premium, in an action for money had and received against the bankrupt — on the principle, that a person declaring his dissent from an illegal wager, before the event happens, may recover back the money he has paid. (2)

(1) *Ex parte Boussmaker*, 15 Ves. 71.

(2) *Busk v. Walsh*, 4 Taunt. 290.

## SECTION XXVII.

*Of expunging and reducing a Proof.*

Before the new statute, the commissioners, after once admitting a proof, could not expunge it without an order of the Lord Chancellor. (1) But now, by the 60th section it is provided, that whenever it shall appear to the assignees, or to two or more creditors, (who have each proved debts to the amount of 20l. or upwards) that any debt proved is not justly due, either in whole or in part, — such assignees or creditors may make representation thereof to the commissioners, who may thereupon summon before them and examine upon oath any person who shall have so proved, together with any other person, whose evidence may appear to the commissioners to be material, either in support of, or in opposition to, any such debt. And if the commissioners, upon the evidence given on both sides — or upon the evidence adduced by such assignees or creditors alone (if the person who shall have so proved shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode) — shall be of opinion, that such debt is not due, either wholly or in part, the commissioners are then empowered to expunge the same, either wholly or in part, from the face of the proceedings. The assignees or creditors, however, who require such investigation, must, before it is instituted, sign an undertaking (to be filed with the proceedings) to pay such costs, as the commissioners shall adjudge to the creditor who has proved such debt; which may be recovered afterwards upon petition to the Lord Chancellor.

The commissioners may now expunge, or reduce, a proof.

But this new power given to the commissioners, it is declared by the same section, is not to prevent the assignees or creditors from applying in the first instance, if they choose, by petition to the Lord Chancellor; nor is either

(1) *Ex parte Nixon*, Mont. B. L. App. 34. *Ex parte Graham*, 1 Rose, 456.

Expunging proof.

When creditor ordered to refund dividend.

When a proof may be expunged.

party, in fact, restricted from petitioning against the determination of the commissioners.

If the creditor has received a dividend upon the proof, which is ordered to be expunged, or reduced, he will upon petition to the Chancellor be ordered to refund such dividend, either in all, or in part, as the case may be. (1)

With respect to those cases where a proof will be ordered to be expunged, or reduced, — it may be sufficient to observe, that where the circumstances are such as would prevent a creditor from proving (if he had not proved already), they will equally authorize the expunging, or reduction, of the proof. As, where a creditor proves a debt, excepting certain bills of exchange which he holds as a security, — if any of such bills are afterwards duly honoured, or in any way *fully satisfied*, the amount must be deducted from the proof, and the dividends made only upon the residue of the debt. (2)

Where a creditor took out a commission, and then relinquished it upon obtaining security for his debt, and under a second commission which was afterwards issued, proved the debt, and was also chosen an assignee, — his proof in this case was ordered to be expunged (3), and a new choice of assignees directed. And where a creditor had prevailed on the bankrupt to give him a bond for more than was due, and had proved it under the commission, — this proof was likewise ordered to be expunged. (4)

Where indorsee discharges acceptor without consent of assignees of indorser.

If the indorsee of a bill of exchange, who proves it under a commission against the indorser, afterwards receives a composition from the acceptor in discharge of the bill, without the consent of the assignees — as the indorsee by so doing discharges the indorser — the assignees have

(1) Ex parte *Smith*, 1 C. B. L. 124. Ex parte *Browne*, 15 Ves. 472. Ex parte *Burn*, 2 Rose, 55. Ex parte *Hunter*, 5 Mad. 165. (2) Ibid. Ex parte *Bloxham*, *ibid.* Ex parte *Wallace*, *ibid.* *Crossley*, *ibid.* Ex parte *Barratt*, 1 G. & J. 327. (3) Ex parte *Parton*, 15 Ves. 461. (4) Ex parte *Brown*, 16 Ves. 472.

also, in such a case, a right to insist that the proof of the debt shall be expunged. (1) This is upon the ground, Expung-  
ing proof. that a discharge of the principal debtor, without the consent of the surety, discharges the surety.

But the discharge of a SURETY by the creditor has not, as we have seen (2), the effect of discharging the principal; nor does it operate as a discharge of the co-surety. Therefore, where a promissory note made by a principal and three sureties was proved by the holder, under different commissions against two of the sureties and the principal — and the holder afterwards received a composition of 4s. in the pound from the third surety, — it was held, under these circumstances, that the proof against the estate of one of the other sureties should not be expunged. (3)

Where the creditor, whose debt is sought to be expunged, is abroad, or lives remote, an order will be made (on motion) that service of the petition on his attorney (4), or on the agent to whom the affidavit of debt was sent, shall be deemed good service. (5)

Where a  
surety  
only dis-  
charged.

Service of  
petition to  
expunge,  
where cre-  
ditor  
abroad.

(1) Ex parte *Smith*, 3 Brown, 1.  
1 C.B.L. 155  
(2) Ante, 288.

(3) Ex parte *Gifford*, 6 Ves. 803.  
(4) Ex parte *Palon*, 3 Mad. 116.  
(5) Ex parte *Dunlop*, ibid. 279.

## CHAP. X.

## OF THE ASSIGNEES.

1. *Of a Provisional Assignee.*
  2. *Of the Choice of Assignees.*
  3. *Of the Interest they take by the Assignment.*
  4. *Of the Nature of their Trust ; and herein*
    1. *Of their general Authority, Duty, and Liability.*
    2. *Of their Duty, more especially, in collecting and disposing of the Bankrupt's Property.*
  5. *When Assignees become Bankrupt.*
  6. *Of the removal of Assignees.*
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## SECTION I.

*Of a Provisional Assignee.*

**B***y section 45 of the new statute, the commissioners may, if they think fit, immediately upon declaring the party bankrupt, and before any meeting for the choice of assignees, appoint one or more person or persons to be a provisional assignee or assignees, either of the whole, or of any part, of the bankrupt's real and personal estate. The provisional assignee is removeable at the meeting of the creditors for the choice of the regular assignees — and must then, under the penalty of 200*l.*, deliver up and assign all the estate of the bankrupt in his possession to the assignees so chosen by the creditors — who will thereupon become as effectually and legally entitled to it, as if the first assignment had been made to them by the commissioners.*

Object of  
the ap-  
pointment.

This power is given to the commissioners, merely for the better securing of the bankrupt's property, and is not often



exercised; for, in ordinary cases, it creates expense without answering any good end. But where the bankrupt is indebted to the Crown, and an extent is apprehended to issue against his property, a provisional assignment is then of essential benefit; for an extent binds the property of the bankrupt, if issued before an actual assignment (1) made by the commissioners. If, however, there is no necessity of this kind for a provisional assignment, the expense of it will not be allowed on the taxation of the petitioning creditor's bill of costs. (2)

*Provisional assignees.*

*Costs.*

When a provisional assignment is made, the bankrupt's copyhold property (3) (if he has any) should be excepted out of it, with a view of saving the expense of two fines to the lord upon surrender and admittance. For an extent does not affect copyhold property; and, therefore, the creditors will run no risk in this respect with regard to the claims of the Crown. (4)

*Copyholds should be excepted.*

## SECTION II.

### *Of the Choice of Assignees.*

By the 61st section of the new act, the assignees are directed to be chosen (5) at the SECOND of the three public meetings, (of which notice has been previously given in the Gazette in the manner stated in a former chapter (6))

*Must be chosen at the second meeting,*

(1) *Queen v. Arnold*, 7 Vin. 104. *Rex v. Cotton*, 2 Ves. 289. *Rex v. Mann*, 2 Str. 749.

(2) *Ex parte M<sup>r</sup> Williams*, 1 Mad. 141.

(3) See Section 64.

(4) *Drury v. Mann*, 1 Atk. 95.

(5) The 5 Ann. c. 22. s. 4. was the first act, that introduced the provision respecting the choice of the assignees by the creditors; but no statute before the present

one, contained any directions when they were to be chosen, though the usual practice was to elect them at the second meeting. For the progress of the law upon this subject, see 1 Christ. 253. 277.

(6) Ante, 141.; and see Section 25. The meeting of creditors for the choice of assignees (as well, indeed, as all the other public meetings appointed by the commissioners, where the commission

**Choice.**  
by what  
creditors.

or at some adjournment of such meeting. And all creditors who have proved debts under the commission to the amount of 10*l.* and upwards, are entitled to vote in such choice, as well as *any person duly authorized by letter of attorney* (1) from any such creditor; the execution of which must be proved, either by affidavit sworn before a Master in Chancery, or by oath before the commissioners *viva voce*; — and in case the creditor resides out of England, by oath before a magistrate where the party shall be residing, duly attested by a notary public, British minister, or consul. The choice is to be made by the major part *in value* of the creditors so entitled to vote. But the commissioners have power to reject any person so chosen, who shall appear to them unfit to be such assignee; and, upon such rejection, a new choice of another assignee must be made in his room. (2)

Commis-  
sioners  
have  
power to  
reject.

Three  
commis-  
sioners  
must be  
present.

*Three* commissioners should be *present* when the choice takes place; otherwise the election becomes invalid, and will be set aside, notwithstanding the assignment is after the election duly *executed* by three commissioners. (3)

Election  
must not  
be post-  
poned  
without  
substantial  
reason.

The choice of assignees is not to be postponed, because certain creditors, whose accounts are in an unravelled state, are not prepared to establish their proofs; for the proceedings under the commission must not on this ground

is executed in London) is now held at the Court of Commissioners of Bankrupts, lately erected in Basinghall Street, in the city of London, and established under the 1 & 2 G. 4. c. 115.

(1) The right to vote under a power of attorney, was by the former law confined to creditors living remote from the place of meeting, and was not even extended to the case of a creditor prevented by illness from attending. (*Ex parte Garland*, 2 Rose, 351.) One partner, it has been decided, may execute such a power

of attorney for himself and his co-partners. Per Lord Eldon, *ex parte Hodgkinson*, 2 Rose, 174.

(2) This power of rejection was before the new statute vested only in the Lord Chancellor. (*Ex parte Shaw*, 1 G. & J. 127.) The commissioners, however, had power to adjourn the choice of assignees from the day publicly appointed for that purpose, although all the creditors present concurred in the election. *Ex parte Garland*, 2 Rose, 361.

(3) *Ex parte Moore*, 1 G. & J. 190.

be impeded ; and, in general, the choice of assignees ought to proceed, however few the creditors may be who have made immediate proof. (1) The commissioners also ought not to adjourn the meeting for the purpose merely of investigating a claim, which is not sufficient to turn the choice ; and where they did so upon one occasion of this kind, they were ordered, on petition, to execute the assignment forthwith to the persons who had been elected assignees ; for the choice of the creditors must be rendered effective by the immediate execution of the assignment, the better to enable the persons chosen to act for the benefit of the estate. (2) The choice, indeed, should never be postponed without a good and sufficient reason, — but should be proceeded with to the best of the judgment of the commissioners, unless a petition against it has been previously presented. (3) If the commissioners, however, are satisfied that a petition for *superseding* the commission will be presented, with the *consent of all the creditors* who have proved debts, they are, in that case, directed by a general order (4) to adjourn the choice to some future day, in order to give the opportunity for presenting such petition.

**Choice.**

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When to be adjourned under the general order.

The qualifications required to be elected an assignee are merely, the integrity of the party, and his sufficient ability to be responsible for the sums he may receive from the bankrupt's estate. It is not *necessary*, that he should be a *creditor* of the bankrupt (5), though it is usual to elect a creditor to the office. And, although a creditor, who is a party to a deed of assignment of the bankrupt's effects previous to the commission, is prevented from being petitioning creditor, and setting up that deed as an act of bankruptcy, he is nevertheless eligible as an assignee, under a commission sued out upon it by another person. (6)

Qualifications of assignee.

(1) *Ex parte Butterfill*, 1 Rose, 196.

(4) 21st August 1818. Buck. 281.

(2) *Ex parte Woolley*, 1 G. & J. 366.

(5) *Ex parte Grequier*, 1 Atk. 90.

In re *Litchfield*, *ibid.* 86.

(6) *Jackson v. Irving*, 2 Camp.

(3) *Ex parte Barclay*, 1 G. & J. 280.

**Choice.**

As to creditor electing himself assignee.

One creditor, if his debt be sufficiently large, may elect *himself* assignee of the bankrupt's estate, within the meaning of the statute, which directs that the choice shall be made by the *major part in value* of the creditors. And the proof of such a creditor is not to be rejected, because he has interests or claims inimical to the general creditors, and *may*, by virtue of such proof, elect himself to be assignee. But if a person of the latter description do elect himself—as the Lord Chancellor would, upon an immediate application, remove him — (1) the commissioners may now also, under such circumstances, equally reject him. In some cases of this kind, where a length of time has been suffered to elapse before the application for the removal — or where transactions of importance have taken place under the commission, which may be affected by removing such an assignee, — the Lord Chancellor has appointed another person to be a co-assignee, or as agent, or inspector, solely for the purpose of investigating and contesting the claims of the assignee so self-elected. (2) In one case, indeed, before Lord Hardwicke, where an assignee died, leaving the bankrupt his sole representative, who thereupon chose himself (the debt being sufficiently large) to be assignee of his own estate, — it was held, that such choice was valid. (3) But in a late case, where the majority of the creditors chose the bankrupt to be assignee, Lord Eldon held, that whether a bankrupt was certificated, or not, there was too much inconvenience in it, to permit him to be assignee of his own estate. (4)

Bankrupt cannot be assignee of his own estate.

When creditors may prove, in order to vote.

If a creditor will make oath of a certain sum being due to him — as his account may be afterwards fully investigated — he ought to be permitted to prove to that amount, for the purpose of choosing assignees, unless there appear to the commissioners to be any reasonable objection to the fairness

(1) *Ex parte Martell*, 1 Rose, 328. *Ex parte Miles*, 2 Rose, 68. 5 V. & B. 139.

(2) *Ibid.* *Ex parte De Tastet*, *ibid.* 324. 1 Ves. & B. 280.; and (3) *Cooper's case*, Green, 260. (4) *Ex parte Jackson*, 2 Rose, 221. see *ex parte Bazarro*, 1 Rose, 266.

of the debt, — in which case they should only suffer him to claim, till he makes out his demand to their satisfaction. (1)

And a creditor, holding a security for part of his debt, may, if he is desirous of voting in the choice of assignees, petition to have a value put upon the security, and prove for the difference before the security is sold. (2) But an application of this nature will depend upon its special circumstances, — of which the general benefit of the creditors, and the amount of the applicant's debt, are two of the most material. (3)

A Corporation vote in the choice of assignees, by a special power of attorney under their common seal. (4)

A Receiver appointed by the Court of Chancery to prove and receive dividends does not, in consequence of that appointment, possess the power of voting in the choice of assignees (5); for the order admitting him to prove is not declaratory of an anterior right, but originates his title; and if the order does not pronounce that he had an antecedent right to prove, he cannot have any right to vote. (6)

The choice of assignees is subject to the most unqualified control of the Lord Chancellor (7), and he will always direct a new choice, when they have been improperly elected. But it is not a sufficient ground to apply for a new choice, merely because creditors were abroad, or were prevented by accident from voting, or have given a defective power of attorney to another person to vote. (8) For if that practice were to prevail, the choice might be postponed to a great length of time, which would be inconsistent with the general provisions of the Bankrupt laws. (9) But if creditors are kept back by fraud, then the Court will attend to such an application. (10) Nor is it a suf-

Choice.

Corporation.

A receiver has no right to vote.

Grounds of application for a new choice.

(1) *Ex parte Simpson*, 1 Atk. 70.

(2) *Ex parte Nunn*, 1 Rose, 322.; and see *ex parte De Tastet*, *ibid.* 324.

(3) *Ex parte Smith*, 2 Rose, 63. 1 Ves. & B. 518.

(4) *Ex parte Bank of England*, 1 Swanst. 10. 1 Wils. Ch. Rep. 295.

(5) *Ex parte Shaw*, 1 G. & J. 151.

(6) *Ibid.* 163.

(7) 12 Ves. 12.

(8) *Ex parte Shaw*, 1 G. & J. 129.

(9) *Ex parte Grequier*, 1 Atk. 90.

(10) *Ex parte Surtess*, 12 Ves.

Choice.

ficient ground to apply for a new choice, that two or three creditors were excluded by the judgment of the commissioners, who, if they had been allowed to prove their debts, might have turned the choice; unless, indeed, they were excluded by some improper conduct or fraud practised upon the (1) commissioners. But, where the commissioners improperly rejected the proof of a debt to a very large amount, whereby two creditors for comparatively trifling sums were enabled to choose the assignees, a new choice was directed, upon condition that the petitioner indemnified the estate against all the costs. (2) And where, through the error of the commissioners, the great body of the creditors is excluded, — the Lord Chancellor, in this case, will permit them to have the opportunity of voting, and will direct a new (3) choice. Such an application, however, should be made as soon as possible after the rejection of the proofs; for the Court will not interfere, where the applicant has been guilty of delay. (4)

Where one of several assignees rejected, choice set aside altogether.

Where, upon a choice of three persons to act jointly as assignees, the Court rejects the nomination of *one* of them, it will set aside the choice altogether; as it cannot be collected, from such *joint nomination of the three*, whether it was the intention of the creditors to entrust the administration of the bankrupt's affairs to *two only* of the three (5), if one should be rejected. But in another case, where one of three assignees refused to act, and the estate would have derived no advantage from the choice of another in his room, the Vice-Chancellor did not think a new choice to be necessary. (6)

Whether bankrupt may canvass for particular assignees.

In the case of *Ex parte Shaw*, the right of the bankrupt to canvass among the creditors for particular assignees was much discussed; and the Vice-Chancellor was of opinion, that the choice should, on that ground alone, be set aside.

(1) *Ex parte Durent*, Buck. 201.  
*Ex parte Mathieson*, *ibid.* 202.  
 (note.) *Ex parte Hawkins*, Buck.  
 520.

(2) *Ex parte Edwards*, Buck.  
 411.

(3) *Ex parte Hawkins*, *supra*.

(4) *Ex parte Scholey*, 1 G. & J. 2.

(5) *Ex parte Shaw*, 1 G. & J. 155.

(6) *Ex parte Kirsley*, Buck. 477.

The Lord Chancellor, upon appeal, did not go into this question, but avoided the election on different grounds; observing, however, that there was great difficulty in determining, what degree of interposition on the part of the bankrupt would render the choice null and void; for that, in some cases, the advice and solicitation of the bankrupt might not be (1) improper.

Choice.

Joint creditors are, by the 62d section of the new act, entitled to prove under a separate commission, for the purpose of voting in the choice of assignees, and of assenting to, or dissenting from, the certificate. (2) But there is no provision enabling *separate* creditors to prove for this purpose under a *joint* commission. The law as to them, therefore, stands as it was before, — which prevents them from voting in the choice of assignees under a joint commission. (3) Upon some occasions, indeed, if the interest of the separate creditors require it, an order will be made, that an inspector shall be appointed for the separate estates, as a check upon the proceedings of the assignees. (4)

Joint creditors may prove under a separate commission, for the purpose of voting.

As soon as the assignees are finally appointed, a proper assignment should be executed to them by the commissioners of all the bankrupt's estate and effects (5), which should be entered of record at the bankrupt office, as well as the commission and the adjudication of bankruptcy, pursuant to the requisitions of the 96th section of the statute; otherwise, none of these documents are now receivable in evidence in any court of law or equity.

Assignment should be entered of record.

(1) 1 G. & J. 152.

(2) Before the new statute they were not so entitled, (*Ex parte Simpson*, 2 Rose, 338.) unless there were no separate creditors qualified to vote. *Ex parte Jones*, 18 Ves. 285. *Ex parte Taylor*, *ibid.* 284. *Ex parte Laycock*, 1 Rose, 32.

(3) *Ex parte Parr*, 18 Ves. 65. 1 Rose, 76. *Ex parte Hamer*, *ibid.* 321. *Ex parte Jepson*, 19 Ves. 224.

(4) *Ex parte Batson*, 1 G. & J. 269.

(5) For the Form see Vol. II.

## SECTION III.

*Of the Interest which Assignees take under the Assignment.*

Assignees  
have no  
interest  
before as-  
signment.

Not bound  
to take  
property  
of doubtful  
value.

Trust pro-  
perty does  
not pass.

The assignees (when duly chosen, and an assignment is made to them by the commissioners) stand in the same situation, both with respect to legal and equitable interests, as the bankrupt himself; and are entitled absolutely to all property of whatever description, which the bankrupt was entitled to for *his own benefit*, either in possession, reversion, remainder, or expectancy. (1) But the bankrupt is not actually divested of his property, neither does any property whatever pass to the assignees, before the assignment is *actually executed* to them by the (2) commissioners. Nor does any property, the value of which is of a doubtful nature, and in regard to which it is uncertain, whether it will be a profit or a burthen to the estate, *absolutely vest* in the assignees, before they have *done some act* to manifest their acceptance (3) of it. For they are not bound to take all the property of the bankrupt — but only such as they may consider will prove beneficial to the creditors, — having power to reject all that may be included under, what Lord *Kenyon* termed, a *damnosa hæreditas*. (4) They have an election, therefore, whether they will take such property, or not; but they must make their election promptly; and when they have once elected, they cannot afterwards renounce the property. (5)

But TRUST property of no description passes in any way to the assignees, if it can be distinguished from the general

(1) *Tyrrell v. Hope*, 2 Atk. 562. *Rushworth v. Hodson*, 2 Show. 103. *Pope v. Onslow*, 2 Vern. 286. *Anderson v. Mottley*, 2 Ves. 255. Ex parte *Herbert*, 13 Ves. 188.

(2) 2 Co. Rep. 26 a. *Warner v. Barber*, 2 Moore, 71. 8 Taunt. 176.

(3) *Copeland v. Stephens*, 1 B. &

A. 593.; and see post, "Assignment of Personal Property," and "Leases."

(4) *Bourdillon v. Dalton*, 1 Esp. 255. *Peake*, 238. *Brome v. Robinson*, cit. 7 East, 329.

(5) Per Lord Ellenborough, 1 B. & A. 307. *Hanson v. Stevenson*.



mass of the bankrupt's property. And where, under special circumstances, a bankrupt would be considered as trustee for another, his assignees will be considered in that light also. (1) For though a Court of Equity will favor the general creditors of a bankrupt as much as it can, yet it must be only where they have a superior right to other persons. (2) The assignees are, therefore, bound by all acts fairly done by the bankrupt, and are also subject to the same equity, to which he himself was subject. Thus, where the bankrupt's wife is entitled to trust property, the assignees cannot obtain it in a Court of Equity, without making a proper provision for the wife. (3) So, where the bankrupt before his bankruptcy paid a promissory note to a creditor for a valuable consideration, but omitted to indorse it, and the assignees afterwards obtained the amount from the drawer, they were considered as trustees (4) for the holder of the note. In cases of this kind, indeed, the bankrupt himself has been holden not incompetent to indorse the note, after the issuing of the commission (5); and the assignees have also, upon petition, been ordered to indorse a bill (6) under similar circumstances.

*Of their interest.*

Bound by the same equities as the bankrupt.

The assignees can also only take such property, as the bankrupt is conscientiously entitled to. Therefore, where a trader fraudulently procured good bills in exchange for a bill which he knew to be forged, and his assignees received the amount of the good bills when they became due; it was held, that the person from whom the good bills were so obtained, might recover the money from the assignees, in an action for money (7) had and received. But in a case of the sale of goods, it was held, that though the bankrupt intended even to defraud the seller, yet that an actual delivery of them to the bankrupt, before his bankruptcy, vested them

Can only take what bankrupt conscientiously entitled to.

(1) *Tyrrel v. Hope*, 2 Atk. 558.

(2) *Brown v. Jones*, 1 Atk. 190.

(3) *Parker v. Dykes*, Davies B.

L. 281.; and see post, "Effect of the Assignment on the Estate of the Wife."

(4) *Ex parte Byas*, 1 Atk. 124.

(5) *Smith v. Pickering*, Esp. 30.

Peake, 50. *Ex parte Greening*,

13 Ves. 206.

(6) *Ex parte Mowbray*, 1 Jac. & W. 428.

(7) *Harrison v. Walker*, Peake,

111.

*Interest.*

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in his assignees. (1) With respect to the specific appropriation, or substitution, of one bill of exchange to answer another when it becomes due, — the assignees have been ordered to apply the proceeds of such substituted bill, to answer the bill dishonored by the bankrupt. (2) Where, however, an action was brought against them to recover the proceeds of a bill so specifically appropriated, it was held necessary to prove, that the produce of the bill came into the hands of the assignees, with a *knowledge on their part* of the purposes for which the bill was destined. (3)

The nature of the *interest* taken by the assignees will be more fully explained in the next chapter, and subsequent parts of this work, under the following heads: viz. “Of the Effect of the Assignment;” “Of Actions and Suits by and against the Assignees;” and “The Relation to the Act of Bankruptcy.”

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#### SECTION IV.

##### *Of the Nature of their Trust.*

1. *Of their general Authority, Duty, and Liability.*
  2. *Of their Duty, more especially, in collecting and disposing of the Bankrupt's Property.*
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##### 1. *Of their general Authority, Duty, and Liability.*

Bound to satisfy themselves of the validity of commission.

The nature of the trust of the assignees depends, both upon the statute, and upon their general legal character as trustees. Their authority is founded upon the commission, and the assignment from the commissioners; and their first duty, both as regards their own responsibility and the interest of the creditors, is to satisfy themselves that the commission is well founded. (4) For if the commission be invalid, the assignment also becomes of no effect; and if the commission be superseded, the assignees are liable to the

(1) 4 Esp. 171.

(2) Ex parte *Peyron*, 2 Rose, 366.

(3) *Kieran v. Johnson*, 1 Star. 109.

(4) Ex parte *Graves*, 1 G. & J. 86.

bankrupt in respect of the property they have disposed of under it. An assignee, indeed, if he chooses to act, is bound to consider the commission (under which he derives his appointment) as a valid commission, otherwise he ought to remove himself from the situation of assignee; — for the Lord Chancellor has no power to indemnify him against the consequences of his acting, nor to prevent any future liability attaching to him in the character of assignee. (1) And where, in an action directed to be brought against an assignee, for the purpose of trying his right to retain certain goods, it became a question, whether the assignee was bound to admit the validity of the commission upon the trial, — Lord Eldon said, that if the assignee elected to dispute it, he must do so at the expense of his proof. (2)

**Authority.**

But if they act, must consider it as valid.

By section 77. of the new statute, all powers vested in the bankrupt, which he might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in the same manner as the bankrupt might have executed them.

All powers vested in bankrupt, may be executed by assignees.

The authority of the assignees is limited to the purposes of their trust, namely, the distribution of the estate under the commission. They have no power, therefore, to enter into an agreement to dispose of the surplus of the bankrupt's effects, after paying 10s. in the pound to the creditors. (3)

Authority limited to purposes of trust.

By section 88. the assignees (with the consent of the major part in value of creditors who have proved debts under the commission, present at any meeting, whereof and of the purport whereof twenty-one days' notice shall have been given in the Gazette) may *compound* with any debtor to the bankrupt's estate, and take any reasonable part of the debt in discharge of the whole — or may give time or take security for the payment of such debt — or may submit any dispute concerning the bankrupt's estate to the determination of arbitrators, to be chosen by the assignees

As to power to compound, and refer disputes to arbitration;

(1) In the matter of *Bryant*, 2 Rose, 17.

(2) *Ex parte Jacks*, 1 Rose, 393.

(3) *Ex parte Barfit*, 12 Ves. 15.

**Authority.** and the major part in value of the creditors, and by the party with whom they shall have such dispute. The award of the arbitrators in such case is declared to be binding upon all the creditors, and the assignees will be indemnified for what they shall do according to such directions. No *suit in equity* can be commenced by the assignees, without such consent of the creditors as above mentioned. (1) But if one-third in value or upwards of such creditors shall not attend such meeting, the assignees have power then, with the consent of the commissioners in writing, to do any of the matters aforesaid.

and to  
commence  
suits in  
equity.

Calling  
meetings.

The assignees, however, may call any other meeting, upon any extraordinary occasion that concerns the creditors; and when they do so, they will act rightly in advertising such meeting, pursuant to the directions of the above section. (2)

As to re-  
ferring to  
arbitra-  
tion.

In referring disputes to arbitration, the assignees (for their own security) should be careful to protest against the reference being taken, as an admission of assets; — for if they refer *generally*, without a protest of this kind, it will amount to such an admission — and will, consequently, render them personally liable to pay the sum awarded, in case of a deficiency of the bankrupt's assets; for there is no distinction, in this respect, between assignees, and executors or administrators. (3)

Operation  
of release  
by one as-  
signee.

One assignee cannot, by giving the other assignees a *general authority* to act for him, enable them to execute a release *by deed*, for which purpose there must be a special authority under seal: but a release, executed by *one* assignee in the *presence* of the other, binds both. (4)

Whether  
a receipt  
of one as-  
signee  
binds the  
other.

The *receipt*, however, of *one* only of several assignees, Lord Hardwicke held, was not an absolute discharge to the debtor, — making a distinction in this case between *assignees* and *executors*; for, he said, though a payment to one

(1) And see post, "Of Suits at Law and in Equity, by and against the Assignees."

(2) Ex parte *Proudfoot*, 1 Atk. 251. Ex parte *Cater*, 1 Bro. 267.

(3) *Robson v. —*, 2 Rose, 50

(4) *Williams v. Waloby*, 4 Esp. 220.; and see *Lord Lovelace's* case, W. Jones, 268. *Bell v. Dunsterville*.

executor is good, because each has a power over the whole estate of the testator, and each is considered as a distinct person; yet, that this was not the case with assignees of a bankrupt, who are in the nature of trustees. (1) But it has been decided by Lord Kenyon at *nisi prius*, that a *bond fide* payment to one assignee would be good, and that his receipt would bind the estate (2); unless, indeed, his co-assignee expressed his dissent;—for, without that exception, one assignee might be enabled to dissipate and destroy the estate in despite of his brother trustee.

Authority.

Assignees will not be permitted to charge the estate for business done by themselves as accountants, though they carry on that particular business for their own livelihood. (3) Nor, though it may be sometimes proper for the creditors to make such an allowance, have they any *right* to charge for their travelling expences. (4)

No right to charge for travelling expences, &c.

Assignees under a *separate* commission against one of two partners, cannot in general engage in new adventures with the solvent partner; though they may do so with the consent of the creditors of the bankrupt. (5)

As to engaging in new adventures.

The assignees are entitled to the custody of the proceedings under the commission, and have a right to nominate the solicitor, with whom they shall be deposited. (6) They are, in fact, responsible for the safe custody of the proceedings; for neither the assignees, nor the solicitor, will be permitted to say, that they are in any person's hands but their own. (7) The solicitor, however, may be changed by the majority of the assignees, and the commission and proceedings will be in that case ordered to be delivered up to the new solicitor;—but the dissenting assignee has a right to know, whether such change will be beneficial. (8)

As to custody of the proceedings, and nomination of the solicitor.

(1) *Cann v. Reed*, 3 Atk. 695.

(2) *Smith v. Jamieson*, 1 Esp.

114. *Bristow v. Eastman*, *ibid.* 172.

(3) *Ex parte Read*, 1 G. & J. 77.

(4) *Per Lord Eldon*, *ex parte Bray*, 1 Rose, 145.

(5) *Crawshay v. Collins*, 15 Ves.

228.

(6) *Ex parte Scarth*, 15 Ves. 293.

*Ex parte Watson*, 1 C. B. L. 105.

(7) *Ex parte Bullen*, 1 Rose, 134.

(8) *Ex parte Scruby*, 1 Rose, 207. *Ex parte Tomlinson*, 2 Rose, 66.; and see post, "Solicitor."

**Duty and liability.**

When liable for the acts of an agent.

If an assignee employs an agent in the conduct and management of the bankrupt's property, who misapplies and embezzles any part of the effects, — the assignee will be liable to make it good, unless he had consulted the body of the creditors (who are his *cestui que trusts*) in the appointment of such agent. (1) But when the assignees employ a person, either from necessity, or conformably to the general usage of mankind, they are not then liable for losses, or for the default of such agent. Thus, where an assignee employed a broker to sell a quantity of tobacco, and the broker received the money, and in ten days failed, without having paid it over, the assignee in this case was held not bound to make it good. (2)

Only answerable for their own acts.

Assignees are, like other trustees, only answerable individually for what each actually receives; and the misconduct of one assignee will not operate against his innocent co-assignee (3); notwithstanding in the assignment they covenant jointly and severally with the (4) commissioners.

As to keeping and auditing accounts.

There are various provisions in the new statute, as to the keeping and the auditing of the accounts of the assignees. Thus, by *section 101. (5)*, they are directed to keep an account of all property of the bankrupt received by them, and all payments made by them on account of the bankrupt's estate; which account every creditor, who has proved a debt under the commission, may inspect at all seasonable times. And, by a general order of Lord Loughborough (6), the assignees under a joint commission are required to keep distinct accounts of the joint and separate estates. By *section 106.*, also, of the new act, the commissioners are directed, at the meeting for the bankrupt's last examination, to appoint a public meeting, not sooner than four calendar months from the issuing of the commission, nor later than six calendar months from the bankrupt's

(1) In the Matter of *Earl of Litchfield*, 1 Atk. 87.

(2) Ex parte *Belchier*, Ambl. 218.; and see ex parte *Wilkinson*, Buck. 197. and post, 339.

(3) *Primrose v. Bromley*, 1 Atk.

98. In the Matter of *Earl of Litchfield*, supra.

(4) 1 Atk. 90.

(5) Taken from 5 G. 2. c. 30. s. 26.

(6) 8th March 1794.

last examination, (whereof twenty-one days' notice must be given in the Gazette) to audit the accounts of the assignees, who must then deliver upon oath a true statement in writing of all money received by them respectively, and when and on what account, and how the same has been employed. And the commissioners are required to examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of the assignees respectively, and enquire whether any sum ought to be retained by them: In this inquiry, the commissioners may examine the assignees upon oath; who are to be allowed to retain all such money, as they shall have expended in suing out and prosecuting the commission, and other just allowances. The assignees, also, by section 101., may be summoned by the commissioners at any time to produce all books and documents relating to the bankruptcy; and in case of default, their attendance may be enforced by warrant; — and upon refusal to produce them, the commissioners may commit the assignee refusing to prison, until he shall submit himself to the commissioners.

*Duty and  
liability.*

May be  
summoned  
to pro-  
duce  
books, &c.

Besides the above provisions as to the authority of the commissioners over the assignees, the latter can be compelled also to account for what they have received by *petition* (1) (not by *bill* (2)) of the bankrupt, or of any of the creditors. But a previous application should be made for this purpose to the commissioners; and if they miscarry in their judgment, or refuse to act, then the creditors, or the bankrupt, may petition the Court to have the accounts taken. (3)

Can be  
compelled  
to account,  
by *pe-  
tition*.

When an assignee dies before he has accounted for the bankrupt's estate received by him, and leaves no personal assets, the commissioners will be considered as specialty creditors; — for the assignee having executed to them a counterpart of the assignment under hand and seal, his covenant to account with them for monies received is in

When as-  
signee dies  
before ac-  
counting.

(1) Per Lord Eldon, Buck. 92.

(3) Ex parte *Brocksope*, Buck.

(2) *Saxton v. Davis*, 18 Ves. 80. 304.

***Duty and liability.*****Bound by contract of bankrupt.**

the nature of a specialty debt, and they may consequently come upon his real estate. (1)

The assignees are bound to fulfil a contract made by a bankrupt before his bankruptcy, part of which has already been performed by him. Therefore, where a bankrupt had contracted to purchase a quantity of wool, on an agreement that a deposit of 5 per cent. was to be made on the amount of the purchase money, and that the remainder was to be paid when he took away the wool; and after the deposit was made, and the bankrupt had taken away part of the wool and paid for it, the price fell in the market; and the assignees contended that the seller could have no further claim after the forfeiture of the deposit, — the Vice-Chancellor held, that (the bankrupt having taken away part of the goods) the assignees were bound in the terms of the contract to take away the remainder; and he ordered the residue of the wool to be sold, and that the vendor might prove for the difference between the amount of the proceeds, and the price which the bankrupt had agreed to give for it. (2)

**When liable for goods ordered by bankrupt.**

Where the assignees authorize the bankrupt, as their agent, to carry on the business for the benefit of the creditors, and the bankrupt orders goods which are used in the business, — the assignees are liable to an action for the price of them, though they are ordered by the bankrupt in his own name. (3)

**For costs and witness's expenses.**

Assignees are liable to pay the costs of the trial of an issue directed to try the validity of the commission, when the verdict is found against them; but they will not be made to pay the costs of a petition to supersede (4) the commission. They are also liable to an action for the travelling expenses of a witness, after allowance by the commissioners; though the witness be also a creditor of the bankrupt. (5)

(1) *Primrose v. Bromley*, 1 Atk. 88.  
*Wackerbath v. Powell*, Buck. 495.

(2) *Ex parte Gower*, sittings after Trinity term 1826, cor. Vice-Chancellor.

(3) *Kinder v. Howarth*, 2 Star. 554.

(4) *Ex parte Edwards*, Buck. 252.

(5) *Yarker v. Botham*, 1 Esp. 64.



It is no defence to an action by a solicitor against an assignee, for business done as solicitor to the commission, that the commission was sued out under a misrepresentation of the solicitor, — such as that the commission would be operative in the Isle of Man, where it turned out to be wholly fruitless; — for the commission cannot, while it exists, be considered as a mere nullity; and the only remedy of the assignee, in such a case, is to have recourse to a cross action against the solicitor. (1) And though a commission be superseded for fraud, to which the assignees are in no way privy — and, though they have not, in fact, received any effects under the commission, — they are, nevertheless, liable to pay the messenger his costs of the several summonses and proceedings *subsequent* to the choice of assignees. (2) Even after a final dividend is made, they are still liable to the messenger for his fees and expenses; for they are presumed to know his claim upon them, and ought to reserve sufficient (3) to satisfy it. Assignees, also, may make themselves liable to the solicitor under the commission, beyond what a Master in Chancery will allow on taxation; though they cannot charge the estate with any fees, or costs, which have not been so allowed. (4)

*Duty and liability.*

When liable to the solicitor and messenger.

The assignees are bound to contribute respectively one to another, for their several proportions of losses, or expenses, occasioned by their joint acts. Thus, where a loss to the bankrupt's estate was brought about by the joint act of three assignees, and an order was made upon the three to make good the loss, and one only paid the whole amount, — upon a bill filed by him against the other two, (although it appeared that they had acted under his representation and advice) contribution was nevertheless enforced against them with costs. (5) So, where two of three assignees became bankrupt, the solvent assignee, who had paid a debt due from the three to the estate, was held

Bound to contribute for expenses of joint acts.

(1) *Pasmore v. Birnie*, 2 Star. 59.

(4) *Finchett v. How*, 2 Camp.

(2) *Ex parte Hartop*, 9 Ves. 109. 278.

12 Ves. 349.

(3) *Ibid.* 1 Rose, 449.

(5) *Lingard v. Bromley*, 1 Ves. & B. 114.

Duty and liability.

entitled to prove a third of such debt against each of their estates. And, if either of the estates in such a case had proved deficient, it seems, that he would not have been restricted from proving a moiety of the deficiency against the estate of the other assignee. (1) Two of three assignees, however, cannot bring a *joint* action against the third, for his share of the contribution towards any loss, or payment (2); but each must bring a separate action. And, in such an action, the plaintiff is not bound to show, that any funds came into the defendant's hands from the bankrupt's estate. (3)

For the duty of the assignees in the payment of dividends, see post, title "Dividend."

*2. Of the Duty and Liability of the Assignees in collecting and disposing of the Bankrupt's Property.*

Personally liable for wrongful seizure of property.

It is the duty of the assignees to collect in all the bankrupt's property, with as much expedition as the nature of it will admit. They should be careful, however, not to seize the property of other persons; for they will become then personally liable for any loss occasioned by such seizure. Thus, in a case where assignees wrongfully took possession of a farm (which did not belong to the bankrupt) and kept it for a long time, during which they had mismanaged it,—the Lord Chancellor ordered, not only the restitution of the property, or its value, but also that the assignees should be personally liable, beyond the funds in their hands, to make good the loss occasioned by such mismanagement; and his decision in this respect was afterwards approved of by the Court of King's Bench. (4)

Liability of joint estate, under a separate commission, for expenses.

If assignees under a *separate* commission are put to any expense in recovering *joint* property, the separate estate is entitled to be reimbursed out of the joint estate. (5) But if, under a separate commission, joint creditors employ a

(1) *Ex parte Hunter*, Buck. 552.

(4) *Ex parte Cowan*, 5 B. & A.

(2) *Brand v. Boulcot*, 3 Bos. & 125.

P. 235.

(5) *Ex parte Rutherford*, 1 Rose,

(3) *Hart v. Biggs*, 1 Holt, 245. 201.

person to collect in the joint property, without first obtaining the sanction of the Court, they who employ him must pay the expense, and not the joint estate. (1)

*Duty in collecting property.*

When the assignees have collected in the property, it is their duty then to sell it as soon as can be done with advantage; and if they neglect to dispose of it, the Lord Chancellor upon the petition of a creditor will order a sale, notwithstanding the assignees may be desirous of keeping the estate unsold, conceiving it to be more beneficial for the creditors; for if such an order be pressed for by any one creditor, Lord Loughborough said, the Court could not refuse it. (2) And in one case, where the assignees had permitted the bankrupt to continue in possession of a farm for eighteen months, they were ordered to sell it, and to pay the costs of the application. (3) In all these cases, if any individual creditor has called upon the assignees to sell property, which they defer the sale of in the expectation of benefiting the estate, it will be at their peril of answering any difference of price, notwithstanding a considerable number of the creditors approve of the sale being deferred. (4)

As to the sale of the property.

The assignees, being bound to exert themselves to make the most of the bankrupt's property, are accustomed generally to put it up to sale at public auction. But though this is the general practice, they may sell it if they choose by private contract; and (with the consent of the creditors) there would, indeed, be no objection to that mode of sale. If, however, they adopt that method upon their own responsibility, — and a complaint be made, that the property by a different mode of disposal might have been made more productive, — the Lord Chancellor will, upon a proper case made out, direct an inquiry whether the property could have been sold to any, and what, greater ad-

Not restricted to any particular mode of sale.

(1) *Ex parte Longman*, 1 Rose, 303.

(2) *Ex parte Goring*, 1 Ves. jun. 168.

(3) *Ex parte Porter*, 4 Mont. B. L. App. 31.

(4) *Ibid.* *Ex parte Hughes*, 6 Ves. 617. *Ex parte Kendal*, 17 Ves. 514.

*Duty in  
collecting  
property.*

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vantage. (1) But the Chancellor will not, in general, make any order *how* the bankrupt's estate shall be sold, but leave that power to the commissioners, who may give directions for selling it in the manner they may think most advantageous. (2) Nor will an order be made to restrain the assignees from selling in any particular mode; for they act in this respect at their own risk, and upon their own responsibility; and they ought, therefore, to be the best judges of the propriety and expediency of the mode of sale. (3)

As to sale  
before the  
commis-  
sioners.

An estate of value is frequently sold before the commissioners; and this, perhaps, is the most effectual mode to prevent all collusion between the assignees and any other party. The advertisement for *such* a sale should not be general, but should specify the period of time when the sale is to take place, — as in the case of a sale before a Master, where the advertisement states that the sale will take place during a certain period, as between the hours of ten and twelve. But if a better bidder offers after that period is expired, and the commissioners are not gone, they ought to admit him; and if they refuse to do so, the Lord Chancellor will, upon petition, open the bidding. (4) Though biddings are not often opened by the Lord Chancellor after a sale has actually taken place, yet, under special circumstances, and upon an early application, such an order will be made, if the justice of the case requires it. (5) Lord Manners, however, refused such an application, where the purchase deed had been executed, and the purchaser put into possession. (6)

When  
biddings  
may be  
opened.

Sales free  
from auc-  
tion duty.

The sales of any real or personal estate of the bankrupt are, by the 98<sup>th</sup> section of the new statute, exempted entirely from the auction duty. Where, however, the bankrupt has mortgaged any part of his estate — and the as-

(1) *Ex parte Dunman*, 2 Rose, 66.

(2) *Ex parte Comings*, 1 Ves.  
112.

(3) *Ex parte Montgomery*, 1 G.  
& J. 338.

(4) *Ex parte Green*, 1 Atk. 202.

(5) *Ex parte Partington*, 1 Ball  
& B. 209. 1 Rose, 367.

(6) *Ibid.*

signees, instead of selling the equity of redemption, take upon themselves to sell the whole property absolutely as the estate of the bankrupt, — such a sale has been held by the Court of Exchequer to be still liable to the auction duty, on the ground, that the bankrupt had no interest in the lands higher than an equity of redemption. And the Court refused even to deduct the proportional part of the duty, payable on the value of the equity of redemption, — considering that one entire duty was payable on the whole, and that if the assignees chose to blend the interest so indiscriminately, the Court was not bound to relieve them. (1)

*Duty in collecting property.*  
—

Assignees are bound, like other persons, to make out a good title to a purchaser, unless they guard themselves by express stipulation (2); nor can they, without doing so, either compel the completion (3) of the purchase, (which they may do in ordinary cases by petition (4) to the Lord Chancellor) or retain the deposit upon the price of the estate, which is contracted to be sold. (5) In a case, however, where assignees put up to sale the bankrupt's interest in an estate under such title "as he lately held the same, an abstract of which might be seen at the office of Messrs. J. and Co.," — it was held, that the vendee could not, after such a notification, insist upon any other title than such as the bankrupt had (6); for a vendor, if he thinks fit, may stipulate for the sale of an estate, with such title only as he happens to possess. (7)

*Assignees bound to make a good title.*

By the 78th section of the new act, the Lord Chancellor may, on the petition of the assignees, or of any purchaser of the bankrupt's estate, order the bankrupt to join in any

*As to bankrupt joining in conveyance.*

(1) *Rex v. Abbott*, 3 Pri. 178.; and see ante, "Proof of Creditors by Mortgage."

(2) *McDonald v. Hanson*, 12 Ves. 277.; and see *White v. Foljambe*, 11 Ves. 343. Sugden, V. & P. 324.

(3) *Orlebar v. Fletcher*, 1 P. Wms. 737.

(4) *Ex parte Gould*, 1 G. & J. 231.

(5) *Bartlett v. Tuckin*, 1 Marsh, 583.

(6) *Freme v. Wright*, 4 Mad. 394.

(7) Mr. Sugden observes upon this case, that conditions like these should be looked at with great jealousy, as they are often traps for the unwary; and the Court should at least expect the fact to be broadly stated, that the seller only sells such title as he has, without warranting the same. Sugd. V. & P. 324.

*Duty in  
collecting  
property.*  
—

conveyance; and by the 87th section, no title of any purchaser can be impeached by the bankrupt, or any person claiming under him, unless the bankrupt shall have applied for a *supersedeas* within twelve calendar months from the issuing of the commission. (1)

Must give  
copies of  
title deeds.

Where title deeds cannot be delivered, assignees must also (like any other vendor) give attested copies of them at the expense of the estate; but they are entitled to limit their covenant, for the production of such deeds, to the time of their continuance as assignees. (2) In the sale of leasehold property, they are not, as incidental to the contract, entitled to a covenant from the purchaser to indemnify them against the rents and covenants in the original lease; for, to enable them to insist upon such a covenant, there must be an express stipulation to this effect in the agreement for sale. (3) And, indeed, there does not seem to be any necessity for a stipulation of this kind at all; for an assignee of a lease, being only liable to the lessor by reason of his privity of estate, is discharged from all further liability as soon as he has effectually assigned the term, and divested himself of all interest in the premises.

Assignees  
restricted  
from pur-  
chasing  
bankrupt's  
property.

The assignees, in the disposal of the bankrupt's property, are considered in their general character as *trustees*; and, therefore, upon the general principle that a trustee shall not purchase the estate of his *cestui que trust*, they are held incapable of becoming purchasers themselves of any part of the bankrupt's property, without the consent of *all* the creditors. And the Lord Chancellor will, upon general grounds of policy alone, and without regard to the fair intentions of the parties, set aside every such sale, — and, in general, make the assignees pay the whole expense (4) incurred by such proceeding. If the assignee so pur-

(1) These sections are similar (though somewhat altered) to the provisions in the 5 G. 4. c. 81. s. 4.

(2) *Ex parte Stuart*, 2 Rose, 215.

(3) *Wilkins v. Fry*, 2 Rose, 371. 1 Meriv. 244.

(4) *Whichcote v. Lawrence*, 5 Ves.

740. *Campbell v. Walker*, 5 Ves. 678. *Ex parte Hughes*, 6 Ves. 617. *Ex parte Lacey*, *ibid.* 625. *Lister v. Lister*, *ibid.* 631. *Ex parte Tanner*. *Ex parte Atwood and Owen v. Foulkes*, *cit.* 6 Ves. 650. *Ex parte Morgan*, 12 Ves. 6.

chasing should have re-sold the estate, and made a profit of it, he will be ordered to account for such profit to the creditors (1); and the very circumstance, of an assignee having purchased part of the bankrupt's property, will be a sufficient ground for removing him, as well as his co-assignee who permitted the purchase. (2) If, however, in investigating a transaction of this description, it should turn out that the contract would be beneficial to the bankrupt's estate — or where the future sale does not produce more than what the assignee agreed to give for it (3) — he will then be held strictly to his bargain. And where an assignee, without the authority of the creditors, bought in the bankrupt's estate, which was put up to auction in two lots — and upon a re-sale there was a loss upon one lot, and a gain upon the other, though the whole balance was in favour of the bankrupt's estate, — the assignee was held in this case chargeable with the whole of the loss on the lot undersold, without being permitted even to set off against it the profit on the other lot. (4) Where notice, however, was given of a reserved bidding at the sale by the assignee for the benefit of the creditors, and several of the principal creditors present at the sale sanctioned such reserved bidding, and afterwards expressed their approbation of the conduct of the sale, — the assignee, under these circumstances, was held not liable for the deficiency between the price that was offered at the sale, and the sum for which the property was afterwards actually sold. (5)

*Duty in collecting property.*  
———

But held to the bargain, when contract beneficial to the estate.

In like manner, if an assignee, instead of selling the estate, should take a lease to himself, he is held answerable to the creditors for profit or loss. (6) And where an assignee was the landlord of certain premises, which had been let to the bankrupt from year to year — and, without determining the tenancy by any notice to quit, the assignee got pos-

Assignee cannot take a lease to himself,

(1) *Ex parte Reynolds*, 5 Ves. 707.

(2) *Ibid.*

(3) *Ibid.*

(4) *Ex parte Lewis*, 1 G. & J. 69.

(5) *Ex parte Burton*, 1 G. & J. 355.

(6) *Ex parte Hughes*, 6 Ves. 617.

*Duty in  
collecting  
property.*  
—

or pur-  
chase di-  
vidends.

Same dis-  
ability at-  
taches to  
the com-  
missioners,  
and the  
solicitor.

When  
strictness  
of the rule  
relaxed.

session of the house, and let it to a new yearly tenant, receiving a *bonus* for such new demise, — Lord Eldon decided, that he was not entitled to retain it; for that an assignee, under these circumstances, cannot resume possession and relet, unless for the benefit of the creditors of the bankrupt. (1) So, if an assignee purchase dividends of the bankrupt's estate from a creditor, and the purchase be beneficial, he is then considered a trustee for the creditor, or the bankrupt, according to the circumstances of the case. (2) And where an assignee had purchased goods at a sale under the commission, and afterwards became bankrupt, it was ordered, that such of the goods as remained in specie should be delivered up (3), and that what he had re-sold should be proved as a debt.

The same disability, as to the purchase of any part of the bankrupt's property, attaches likewise to the commissioners, and the solicitor under the commission — who, by reason of the situation in which they respectively stand, are subject to the same rule as the assignees are bound by in this respect. (4)

The strictness of the rule has, however, in certain cases, been relaxed by the Lord Chancellor; but this has only been done under very special circumstances, upon an application made previous to the purchase, and with the consent of the creditors obtained at a meeting called for that express purpose. (5) In one case, where (from the situation of the property) it was difficult to obtain a purchaser, and the property had been valued by an indifferent person, and the *bankrupt* consented to the purchase, — it seems, that an assignee was allowed to purchase. (6) But though the creditors, at a meeting convened by advertisement (7),

(1) *Ex parte Wright*, 2 Rose, 244.

(2) *Ex parte Lacy*, 6 Ves. 625.

(3) *Ex parte Spong*, 1 Rose, 133.

(4) *Owen v. Folkes*, 6 Ves. 639. note (b). *Ex parte James*, 8 Ves. 537. *Ex parte Linwood*. *Ex parte Churchill*, cited *ibid.* 345. *Ex parte Bennet*, 10 Ves. 381.

(5) *Ex parte Hodgson*, 1 G. & J. 12. *Ex parte Page*, 4 Mad. 459.

(6) *Ex parte Maychell*, Whitn. B. L. 153. Sed quære, whether there must not have been also the consent of the *creditors*, as well as that of the bankrupt.

(7) Mr. Eden in his *Treatise on the Bankrupt Law* (p. 205.) sug-



sanction a sale of the bankrupt's effects at a valuation to an assignee, the Court will not order that the assignee shall be allowed to purchase, without a reference to the commissioners, to ascertain whether the property can be more advantageously disposed of. (1) Nor will such an order be made, unless the other assignees, as well as the bankrupt, are served with the petition. (2)

*Duty in collecting property.*  
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By the 102d section of the new act, the major part in value of the creditors present at the choice of assignees, may direct how and where the money received out of the bankrupt's estate shall be paid in, and remain, until it be divided; and if they do not make such direction, then the commissioners are empowered to make it. But no money can be directed to be paid into the hands of any of the commissioners, or of the solicitor to the commission, or into any banking-house or other house of trade, in which any such commissioner, assignee (3), or solicitor (4) is interested.

How money to be lodged until a dividend.

casts a very reasonable doubt, how far the consent of such a meeting would be sufficiently indicative of the consent of the creditors, (and see *Nias v. Adamson*, 3 B. & A. 225.) for that few persons, in point of fact, see the Gazette, and a meeting of creditors is, in point of practice, but very thinly attended. The power of creditors present at such a meeting to bind those who are absent, has been often indeed somewhat hastily presumed; the new statute gives it only in some peculiar cases, such as to enable the assignees to compound with creditors, submit to arbitration, commence suits in equity, or accept a composition contract from the bankrupt or his friends.

(1) *Ex parte Serle*, 1 G. & J. 187.

(2) *Ex parte Page*, 4 Mad. 459.

(3) For want of this restriction, much inconvenience and loss was formerly occasioned to the cre-

ditors. See *Ex parte Baker*, 18 Ves. 246.

(4) This enactment, with the exception of the prohibition contained in the last part of it, is conformable to the 5 G. 2. c. 30. s. 32., which contained a similar provision. But, notwithstanding the directions of this last mentioned act, it frequently happened that large sums of money remained in the hands of the assignees, who delayed dividing the same amongst the creditors, and often made use of the money for their own purposes. To remedy this evil in some measure, Lord Loughborough, by a general order 8th March 1794, directed, that where the creditors had not given directions where the money was to be placed, the assignees should pay it into the Bank of England, as often as it amounted to 100l. Money, however, to a large amount was still often retained by the assignees, which oc-

*Duty in collecting property.*

May be invested in purchase of exchequer bills.

Penalty on assignee retaining money in his hands.

By the following *section* 103, the commissioners may direct any money to be invested in the purchase of exchequer bills, for the benefit of the creditors; and may also direct where and with whom such exchequer bills shall be kept, and may cause the same to be sold, when it shall seem to them expedient that the proceeds should be again laid out in the purchase of others for the benefit of the creditors; subject, however, in every case of this kind to the control of the Lord Chancellor.

And by *section* 104., if any assignee shall retain (1) in his hands, or employ for his own benefit, or knowingly permit his co-assignee to retain or employ, any sum to the amount of 100*l.* of the bankrupt's effects; or shall neglect to invest money in the purchase of exchequer bills, when directed as above mentioned; — such assignee will be liable to be charged by the commissioners with interest, at the rate of 20 *per cent.*, on all such money for the time during which he shall have retained or employed it, or permitted the same to be done, — or during which he shall have neglected to invest the money in the purchase of exchequer bills.

This enactment will be construed strictly against the assignees, as the act is imperative; and great mischief, indeed, would frequently ensue to the creditors, if assignees were encouraged, by any laxity of construction, to disregard regulations so important to the general interests of the creditors. Therefore, where an assignee kept 346*l.* in his

casioned frequently considerable losses to the creditors; and the only means, which the Court had to deter assignees from such misconduct, was to make them pay interest for all money wilfully retained in their hands. *Ex parte Lane*, 1 Atk. 90. *Turner v. Townsend*, 1 C. B. L. 274. 1 Cox, 50. 1 Bro. 384. *Hilliard's case*, 1 Ves. 89. *Hankey v. Garratt*, 3 Bro. 460. *Ex parte Edwards*, 6 Ves. 3. *Ex parte Townsend*, 15 Ves. 470. *Ex*

*parte Baker*, 18 Ves. 246. This induced the legislature, first in the 49 G. 3. c. 121. s. 4. and now in this act (*section* 104.), to impose a severer pecuniary penalty upon the assignees for not obeying the directions of the creditors or commissioners, as to the deposit and investment of the money belonging to the bankrupt's estate.

(1) The former enactment in the 49 G. 3. c. 121. s. 4. was if he should *wilfully* retain, &c.

hands for about three months, though without any evil intention being imputed to him — and having in fact acted meritoriously in the general matters of his trust, — he was, nevertheless, ordered by Lord Eldon to pay the penalty of 20l. per cent., from the time when he ought to have paid the money into the bankers. (1) But where assignees gave cheques upon the banker of the estate to an *agent*, to enable him to purchase exchequer bills, pursuant to the commissioners' order, for the benefit of the estate — and the agent received the money and converted it to his own use, but some time afterwards replaced it at the banker's, — it was held, that the assignees were not, for the acts of an agent so employed, chargeable with the 20 per cent. upon the amount of the monies misapplied; as this was not a *wilful* retention or employment of the money for their own benefit. (2) The penalty of 20 per cent. is to go in augmentation of the general estate of the bankrupt, and does not belong to any particular creditors, as a compensation for the loss they have suffered from the acts of the assignee. (3) Where an assignee died after the misapplication of monies in his hands, the late Vice-Chancellor thought that his estate was liable to pay the 20 per cent. upon the funds misapplied, though the amount of this *penalty* could not be considered (as the amount of the misapplied funds was) a specialty debt against the deceased assignee's estate (4); but Lord Eldon decided in this case, that the estate could only be charged with 5 per cent. (5) The penalty is meant to apply to a solvent assignee only, and is not intended to prejudice the general creditors of a *bankrupt assignee*, against whom a different penalty is imposed by the 105th section of the statute. Therefore, where the assignee becomes bankrupt, his co-

*Duty in  
collecting  
property.*

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(1) *Ex parte Bray*, 1 Rose, 144.

*these circumstances*, be more liable to the penalty than he was before.

(2) *Ex parte Wilkinson*, Buck. 197. Quære, whether though the word *wilful* is omitted in the new statute, the assignee would, under

(3) *Wackerbarth v. Powell*, Buck. 495.

(4) *Ibid.*

(5) *Id.* 2 G. & J. 151.

*Duty in  
collecting  
property.*  
—

assignee will only be permitted to prove for the amount of the money so mis-employed, with interest at 5 per cent., and not to include in the proof the penalty of 20 per cent. (1) In order to charge the assignees in an action with the 20 per cent. on balances retained, it seems, that the commissioners ought previously to settle an account charging them with such interest; and, as it is in the nature of a penalty, it must be declared on *pecially*, and is not recoverable on the common count for interest. (2)

*Where  
one as-  
signee  
absconds.*

Where money was deposited in the Bank in the names of three assignees, and one of them absconded, an order was made by Lord Eldon, that the Bank should pay the cheques signed by the other two assignees. (3)

## SECTION V.

### *When Assignees become Bankrupt.*

*What may  
be proved  
against an  
assignee.*

The bankruptcy of an assignee does not put an end to the trust; and the money which he has received, remaining unaccounted for by him, may be proved under his commission. The proper person to prove is the solvent co-assignee; and the amount of the proof will be the balance due from the bankrupt assignee, with interest at 5 per cent. (4) But, if a proof in the original bankruptcy be not made until after the bankruptcy of the assignee, the demand of a creditor (so proving under the original bankruptcy) cannot be proved under the commission against the assignee, — and consequently will not be barred (5) by the assignee's certificate.

*Bankrupt  
assignee  
not en-  
titled to  
dividend  
till when.*

When an assignee becomes bankrupt, *his* estate will not be entitled to any dividend on the proof made by him under the estate of which he was assignee, until full reimbursement is made to that estate of the money, which he had in his hands at the time of his own bankruptcy (6);

(1) *Ex parte Goldsmith*, 1 G. & J. 405.; and see post, 296.

(2) *Beresford v. Birch*, 1 Carring. N. P. 573.

(3) *Ex parte Hunter*, 2 Rose, 363.

(4) *Wackerbarth v. Powell*, Buck. 495. *Ex parte Goldsmith*, supra.

(5) *Ex parte Stonehouse*, Buck. 531.

(6) *Ex parte Bignold*, 2 Mad. 470.

for a man ought not to come as a *creditor* upon an estate, of which he is himself a *debtor*. (1)

When an assignee becomes bankrupt.

Where two of three assignees became bankrupt, the solvent assignee, who had paid a debt due from the three to the estate, was held entitled to prove a third of such debt against each of their estates. And if either of the estates proved deficient, it seems, that he would not have been restricted from proving a moiety of the deficiency, against the estate of the other assignee. (2)

Where two assignees bankrupt, solvent assignee may prove what.

By section 105. of the new statute, if any assignee shall retain in his hands, or employ for his own benefit, any sum to the amount of 100*l.* of the bankrupt's estate, and become bankrupt himself, being so indebted to the estate of which he is assignee, his certificate will only have the effect of freeing his person from arrest and imprisonment; but his *future effects* (with certain exceptions) will remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with interest for the whole debt.

Certificate of a bankrupt assignee, who misapplies money, does not protect his future effects.

The penalty of 20 per cent. imposed by the 104*th* section, it has been already (3) observed, does not apply to the case of a bankrupt assignee; for that would operate as a prejudice to his own general creditors, without imposing scarcely any penalty on himself for his default. The 105*th* section, therefore, provides a severer penalty, by rendering his future effects liable to the extent of his default, notwithstanding his certificate.

By a general order (4) of Lord *Loughborough*, if an assignee become bankrupt, he is to be removed, and ceases to be an assignee. (5) And in that event, as well as in case of his death, upon application made to the major part of the commissioners, and signed by one or more creditors, who have proved under the commission and are entitled to vote

Bankrupt assignee to be removed, and another appointed.

(1) *Ex parte Bebb*, 19 Ves. 222.  
*Ex parte Graham*, 3 V. & B. 138.  
 2 Rose, 74.

(5) See ante, 339.

(4) 8th March, 1794.

(5) And see *ex parte Newton*,

(2) *Ex parte Hunter*, Buck. 552. 1 Atk. 96.

*When  
assignees  
bankrupt.*

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in the choice of assignees, the commissioners are to cause notice to be given in the Gazette of the time and place to proceed to the choice of a new assignee, instead of the one become bankrupt, or dead. And, as this general order supersedes the necessity of a petition for removal, such a petition, if presented, will be dismissed with costs. (1)

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## SECTION VI.

### *Of the Removal of Assignees.*

Lord  
Chancel-  
lor may  
vacate any  
convey-  
ance or as-  
signment ;

and order  
commis-  
sioners to  
execute a  
new one.

By the 66th section of the new statute, the Lord Chancellor has full power given him, upon petition, to order any conveyance (2) or assignment of the bankrupt's estate to the assignees to be vacated ; provided that no title of any purchaser prior to such order be thereby affected, and that no estate previously barred be thereby revived. (3) And the Chancellor may, also, at the same time order the commissioners, to execute a new assignment, of the debts and effects unreceived and not disposed of, to any other person or persons to be chosen by the creditors, as well as a new conveyance of the real estate unsold, or not conveyed. And if such new assignment shall be ordered, the debts and personal estate of the bankrupt are declared to be thereby vested in such new assignees. The commissioners are directed, also, upon such removal and appointment, to cause advertisements giving notice thereof to be inserted in the two next London Gazettes ; and if a new conveyance shall be ordered, it is declared to be valid

(1) *Ex parte Watts*, 1 Rose, 436.

(2) This is an extension of the 5 G. 2. c. 30. s. 31., under which statute there was sometimes a difficulty in vacating the *bargain and sale* to the assignees of the freehold property of the bankrupt ; as that statute only spoke of vacating the

assignment. See *ex parte Curry*, Buck. 316. In re *Goodchild*, Buck. 322. note. *Ex parte Bainbridge*, 6 Ves. 451. *Ex parte Lenox*, 13 Ves. 271.

(3) And see In re *Goodchild*, Buck. 322. *Ex parte Harris*, 3 Mad. 475.

without any conveyance from the former assignees, provided that the order for vacating any bargain and sale be enrolled, and that any new bargain and sale be also enrolled in the same court as the first. *Removal.*

The power possessed by the Lord Chancellor, of removing assignees, will always be exercised in a case of gross misconduct. (1) Thus, if an assignee makes use of, or trades with, the bankrupt's property for his own benefit (2), permits improper expenses by the commissioners (3), or purchases an estate belonging to the bankrupt (4), he will be removed; and in the last case, a co-assignee who permitted such purchase, was also ordered to be removed. So, where an assignee refuses to act (5); or is proved to be insolvent, or to have compounded with his creditors; or where an account cannot be conveniently and justly taken while he remains assignee, --- he will, also, in either of these cases be removed. (6) But the mere circumstance, that the assignee has an unsettled account with the bankrupt, or that his debt may be disputed by the creditors, is not a sufficient cause for his removal; unless, indeed, there is something in the nature of his interest, rendering it impossible to take the account with due impartiality and justice. (7) An assignee, who becomes bankrupt, we have already seen, is removable under the general order (8), which supersedes the necessity of a petition to the Chancellor for that purpose. And an assignee permanently residing in *Scotland*, or having quitted this country, will be removed upon petition; for the Court has no hold over him, and can reach him by no process (9), --- and in such a case, service of the petition at his last place of abode will be deemed

Grounds  
for re-  
moval of  
assignees.

(1) *Ex parte Halliday*, 7 Vin. Ab. 77. 12 Ves. 15.

(2) *Ex parte Townsend*, 15 Ves. 470.

(3) 7 Vin. Ab. 77.

(4) *Ex parte Reynolds*, 5 Ves. 707.

(5) *Ex parte Kersley*, Buck. 477.

(6) *Ex parte Surtees*, 12 Ves. 10.; and see *ex parte De Tastet*, 1 Rose, 324.

(7) *Ibid.*

(8) *Ante*, 342.

(9) *Ex parte Grey*, 13 Ves. 274.

**Removal.** good service. (1) But it is not a valid ground for the removal of assignees, that the commissioners improperly rejected the proof of a debt, that would have turned the choice, — unless the rejection was fraudulent. (2)

The bankrupt cannot petition for the removal of assignees, without the concurrence of, at least, one creditor. (3)

May be removed before assignment.

If the circumstances of the case require it, an assignee may be removed by the Lord Chancellor, even before the execution of the assignment from the commissioners (4), and so as to dispense with that formality.

As to the assignment to the new assignee.

Where an assignee formerly became bankrupt and was removed, *his assignees*, as well as himself, were obliged to join with the commissioners in executing an assignment (5) to the new assignee, who might be chosen in his room under the original commission, — though that proceeding, since the 5 G. 2. c. 30., appears to have been somewhat unnecessary. (6) In subsequent cases, however, where assignees were dead, or had absconded, or from other causes could not execute the assignment to the new assignees, the Lord Chancellor, under the authority of the 5 G. 2. c. 30. s. 31., directed the first assignment to be vacated, and ordered an immediate assignment from the commissioners to the new assignee. (7) And this practice is conformable to the above directions of the present statute.

Where one of several assignees refuses to act.

Where one of three assignees refused to act, and the estate was small, and would have derived no advantage from the choice of another in his room, the assignment and bargain and sale were ordered by the Vice-Chancellor to be vacated, and a new assignment and bargain and sale

(1) *Ex parte Bonbonus*, 3 Mad. 23. *Ex parte Corry*, Buck. 314.

(2) *Ex parte Durent*, Buck. 201.

(3) *Ex parte Townsend*, Eden, B. L. 2d ed. 222.

(4) *Ex parte Shaw*, 1 G. & J. 153.

(5) *Ex parte Newton*, 1 Atk. 96.

(6) Per Lord Eldon, in *re Goodchil*, Buck. 323. in note.

(7) *Ex parte Bainbridge*, 6 Ves. 451. *Ex parte Bury*, C. B. L. 276. *Ex parte Wilson*, *ibid.* *Ex parte Leman*, 13 Ves. 271. *Ex parte Higgins*, 1 Ball & B. 218.



made to the two acting assignees, without directing a new Removal.  
choice of another assignee. (1)

In all cases where an assignee is removed, an action for money had and received may be maintained against him by the remaining assignee. (2)

A mere *order* of the Lord Chancellor for removing one of several assignees, not followed up by any re-assignment, or release, of such assignee to the remaining assignees, nor by any new assignment by the commissioners, does not operate to divest the legal estate out of such removed assignee. And therefore, in a case of this kind, where the remaining assignees (three in number) brought an action of trover, though there was no plea in abatement by the defendant to the whole action, they were held entitled to recover only three fourths of the property for which the action was brought. (3)

A mere order for removal does not divest the legal estate.

If an assignee applies to be removed upon his own petition, it seems that he should make an affidavit, that he does not apply under an apprehension, that any application will be made against him by another person for that purpose. (4) And whenever an assignee wishes to retire, he will be required to pay the costs of a meeting for a new choice, and of his application to retire — as well as to give security (to be approved of by the Master) (5) to indemnify the estate against any costs of legal proceedings already commenced, and not continued by the new assignee, unless the Master reports that such costs were properly incurred. He must, also, permit the new assignee to use his name in any legal proceedings already commenced, upon being indemnified by the new assignee. (6) Where an assignee, however, is removed for the convenience of the estate — as in case of

Where an assignee applies to be removed.

Must pay the costs of removal ;

except when.

(1) *Ex parte Kersley*, Buck. 477.

(2) *Smith v. Jameson*, Peake, 213.  
1 Esp. 114.

(3) *Bloxam v. Hubbard*, 5 East, 407.

(4) *Ex parte Edwards*, 6 Ves. 3.

(5) The commissioners have no authority, it seems, to take such security.

(6) *Ex parte Thorley*, Buck. 231. In re *Roberts*, *ibid*, 465.  
3 Mad. 275.

***Removal.***            infirmity—he does not pay the costs occasioned by his removal, as he does when removed (1) for his own convenience. Nor is he liable to the petitioning creditor for his bill of costs as taxed by the commissioners, unless there is a charge of collusion between him and the new assignee. (2)

(1) Anon. 5 Mad. 76.

(2) In re Gibson, 1 G. & J. 503.

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## CHAP. XI.

## OF THE ASSIGNMENT BY THE COMMISSIONERS.

## PART I.

- SECT. 1. *Of Freehold Property generally, and the Mode of Conveyance.*
2. *Of Copyholds.*
  3. *Of Mortgages.*
  4. *Of Offices.*
  5. *Of Advowsons.*
  6. *Of Reversions.*
  7. *Of Powers.*
  8. *Of a Possibility.*
  9. *Of a voluntary Conveyance.*
  10. *Of an executory or beneficial Contract.*
  11. *Of the Estate of the Wife, and Property settled by the Bankrupt on his Wife and Children.*
- 

HAVING considered generally in the preceding chapter the nature of the interest taken by the assignees under the assignment of the commissioners, it is proposed in the present one to specify more particularly the effect and operation of the assignment, as it regards the various species of the bankrupt's property, dividing the subject into two parts : viz.

1. As it affects the Bankrupt's Real Estate.
2. As it affects the Personal Estate.

The *Real estate* may be treated of more conveniently under the foregoing heads.

## SECTION I.

*Of Freehold Property generally, and the Mode of Conveyance.*

Commissioners to convey to assignees the bankrupt's lands, &c.

By *section 64. (1)* of the new act, the commissioners are directed, by deed indented and inrolled in any court of record, to convey to the assignees, for the benefit of the creditors, all lands, tenements, and hereditaments (except copyhold or customary hold) in England, Scotland (2), Ireland, or in any of the dominions, plantations, or colonies, belonging to his majesty, to which any bankrupt is entitled, and all his interest therein, of which he might have disposed himself, — as well as all such lands, tenements, and hereditaments as he shall purchase, or which shall descend, be devised, revert to, or come to, such bankrupt before he shall have obtained his certificate; together with all deeds, papers, and writings respecting the same; and every such conveyance shall be valid against the bankrupt, and all persons claiming under him. Provided, however, that where, according to the laws of any plantation, or colony, such conveyance would require registration, enrolment, or recording, the same shall be so done; and that, prior to the same being done, the conveyance shall not invalidate the title of any purchaser for valuable consideration, without notice of the issuing of the commission.

Commissioners have only

The commissioners have no *estate* given them in the bankrupt's real property, by virtue of this enactment; but

(1) This section, (except as to the provision respecting copyhold and colonial property) is taken from the 15 Eliz. c. 7. s. 11.; and 5 G. 2. c. 30. s. 26.

(2) Previously to this act, a commission of bankruptcy in England was held by the Court of Session, not in itself to operate upon the

heritable property of the bankrupt in Scotland, though it was considered to impose upon him a legal obligation to execute the proper conveyances, and do the necessary acts for transferring such property to his assignees. *Bank of Scotland v. Cuthbert*, 1 Rose, 462.; and see *Sellrig v. Davies*, 2 Dow. P. C. 230.

only a *power*, which must be strictly executed according to the directions of the statute, viz. by DEED INDENTED AND ENROLLED; otherwise it will have no execution or effect in passing the estate. (1) No *particular form* of conveyance has ever been prescribed (by statute) for the commissioners to convey the bankrupt's real estate; but that by *bargain and sale* (2), as being the cheapest, has been always adopted by them. Nor is any particular period of time limited in the above section, for the enrolment of the conveyance; but under the statute of 27 Hen. 8. c. 16. (which applies to *all bargains and sales*) it must be enrolled *within six months* after its date, or it becomes null and void. (3) If the commissioners, however, were to adopt any *other form* of conveyance than that of a bargain and sale, such conveyance might be enrolled at any period. And though an enrolment pursuant to the statute of enrolments relates back, in general, to the date of the deed, yet in bankruptcy it is otherwise; for where an ejectment is brought upon a conveyance of the commissioners, and the demise is laid after the date of the deed, but *before enrolment*, (notwithstanding it may be duly enrolled afterwards) the ejectment cannot be maintained. (4) The bargain and sale, therefore, should be enrolled without delay; and if it is lost without enrolment, the Lord Chancellor will not make an order that the counterpart shall be enrolled as the original deed. (5)

*Freeholds generally, &c.*

—  
a power,  
not an  
estate.

Bargain  
and sale  
must be  
enrolled  
without  
delay.

Where, however, lands had been bargained and sold by a bankrupt *before his bankruptcy*, though the enrolment of the bargain and sale did not take place until after the bankruptcy — yet it was held in this case, that the commissioners had not power to convey these lands to the assignees. (6)

(1) *Perry v. Bowers*, T. Jones, 12 Mod. 3. *Bennet v. Gandy*, 196. Carth. 178.

(2) For the form see Vol. II.

(5) *Ex parte Robson*, Ambl. 180.

(3) *Thomas v. Popham*, Dyer, 2 Com. Dig. 25.

(6) *Audley v. Walsey*, Sir W. Jones, 203.

(4) 1 Ventr. 360. *Elliot v. Dan-*

*Freeholds generally, &c.*

Relation of bargain and sale.

The bargain and sale does not (as the assignment does with regard to the personal property) relate back to the act of bankruptcy; for all the real estate of the bankrupt remains in him, though not beneficially, until taken out of him by the actual execution of the bargain and sale (1); and therefore a demise in ejectment, though laid after the act of bankruptcy, yet if it is before the date of the bargain and sale, has been holden to be bad. A court of equity, however, has refused to dismiss a bill of foreclosure against the assignees of a bankrupt mortgagor, on the ground, that it was brought before the execution of the bargain and sale by the commissioners, and that the assignees had no interest which could be made the subject of foreclosure. (2)

Operation. As the conveyance of the bankrupt's lands to the assignees operates only upon those estates, of which the bankrupt is possessed, or to which he is entitled *at the time* of executing the deed,—if, therefore, any future estates come to him, between the time of the bargain and sale and the time of his obtaining his certificate, there must be a new conveyance. (3)

Passes a vested contingent interest:

But the conveyance of the freehold property passes any *contingent interest*, which the bankrupt may have in any lands or tenements, and which is *vested* in him at the time of his bankruptcy. Therefore, where an estate was settled to the bankrupt for life, with other intervening uses, remainder to himself in fee, with power to change the uses,—the remainder in fee was held to vest in the assignees, and his power of revocation to be gone. (4)

and a right of action.

A *right of action* is within the policy of the bankrupt laws; and therefore a right to bring a real action passes by the general words hereditaments, right, claim, &c. in the bargain and sale. (5)

(1) *Doe v. Mitchell*, 2 M. & S. 253. 1 P. Wms. 383. Billing, 118. 446. *Carleton v. Leighton*, 3 Meriv. 667.

(2) *Bainbridge v. Pinhorn*, Buck. 155.

(4) Loft, 71.; and see post, 363.

(3) *Ex parte Proudfoot*, 1 Atk.

(5) *Smith v. Coffin*, 2 V. & B. 444.

A bankrupt's lands are not liable to a debt by statute or judgment, unless execution is taken out upon it more than two calendar months before the opening of the commission; and not even then, if the statute or judgment creditor had notice of any act of bankruptcy at the time of levying such execution; for, in that case, he can only come in *pro rata* with the rest of the creditors. (1) But if a statute be extended upon the bankrupt's lands before the period mentioned in the act, though the liberate is not sued out till afterwards, — in that case, the lands are bound by the statute. (2) And where lands descend to a bankrupt as heir, and the ancestor was indebted at the time of his death, it has been determined, that a specialty creditor has the same right to follow the real assets, or their specific produce, in the hands of the assignees, as if the heir had not become bankrupt. (3)

*Freeholds generally, &c.*

—  
Lands are not liable to a statute, or judgment debt, unless execution previously taken out.

If a bankrupt is entitled to lands in joint-tenancy, and dies, — it is said (4) by Billingham, that there is no right of survivorship, and that his share may be sold under the commission; for that the bankrupt's moiety is bound by his bankruptcy, — as he had power to sell it in his life-time, and might have departed with it. (5) It seems doubtful, however, if the bankrupt died before the execution of the bargain and sale, whether such moiety would in that case pass to the assignees; as the real estate, we have seen, is not till then taken out of the bankrupt at law. (6) And if the bankrupt dies before adjudication, the commission being in that case absolutely void (7), the whole estate would, of course, go to the surviving joint-tenant. As a valid commission of bankruptcy, however, followed up by adjudication and assignment, operates as a dissolution of

As to lands in joint tenancy.

(1) *Newland v. Watts*, 1 P. Wms. 92. *Orlebar v. Duke of Kent*, *ibid.* 737.; and see section 81.

(2) 1 C. B. L. 373.

(3) *Ex parte Morton*, 5 Ves. 449.

(4) *Billingham*. 111.

(5) C. B. L. 279. Good, 89. 2 Com. Dig. 26.

(6) *Doe v. Mitchell*, ante, 304.

(7) *Ex parte Beale*, 2 Ves. & B.

29. 1 Rose, 149.

*Freeholds generally, &c.*

partnership, it seems to be agreed, that it also severs a joint-tenancy. (1)

As to conveyance of estates tail.

With respect to *estates tail*, the commissioners are empowered to convey such estates immediately to a purchaser, without including them in the bargain and sale to the assignees, of the general freehold property of the bankrupt. For by the 65th section of the new act it is provided, that the commissioners may in like manner by deed indented and enrolled (2) make sale, for the benefit of the creditors, of any lands, tenements, and hereditaments, situate either in England, or Ireland, whereof the bankrupt is seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, of the gift or provision of the crown. And every such deed will be good against the bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, as well as those whom the bankrupt by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest in such lands, tenements, and hereditaments.

Where remainder-man in tail bankrupt, assignees take only a base fee.

Where a remainder-man in tail becomes bankrupt, the commissioners can only in such a case convey a base fee; and even where a joint commission issued against the tenant for life and the tenant in tail in remainder, it was holden, that the assignees only took an estate for life in the premises, and a base fee in remainder, determinable upon the death of the tenant in tail, and failure of heirs male of his body. (3)

A devise of lands not revoked

Bankruptcy of itself has not the effect of revoking a devise of the bankrupt's real estate, provided the debts are

(1) Evans on the Bankrupt Statutes, 17. note (b).

(2) A particular period of time was limited for the enrolment of the conveyance of the bankrupt's estate tail, by the 21 Jac. 1. c. 19. s. 12. from which this section ap-

pears to be taken; but this section is, like that relating to the bankrupt's other freehold property, wholly silent upon the subject of enrolment.

(3) *Jarvis v. Tayleur*, 3 B. & A. 557.



satisfied without having recourse to such estate; for the statute takes the property out of the bankrupt only for the purpose of paying his creditors; and from the moment that the debts are paid, the assignees are mere trustees for the bankrupt, and can be called on to convey back the surplus property to him. (1)

*Freehold generally, &c.*

by bankruptcy.

Where an assignee dies, and the bankrupt's real estate becomes vested in the heir of the assignee, who happens to be an infant, — a petition in that case should be presented to the Lord Chancellor to order the heir, as an infant trustee, to execute any necessary conveyance to a purchaser; but the application must be made to the Chancellor, not as sitting in bankruptcy, but under the statute of the 7 Ann. c. 19. relating to infant trustees and mortgagees. (2)

Where an assignee dies, leaving an infant heir.

By section 81. of the new act, all conveyances by a bankrupt, and all executions and attachments against his lands and tenements *bonâ fide* executed or levied more than two calendar months before the issuing of the commission, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the party had not at the time notice of any prior act of bankruptcy.

Conveyances, &c. more than two months before the commission, valid.

And for the better security of the purchasers of the bankrupt's estate, it is by the 78th section of the statute enacted, that the Lord Chancellor may, upon the petition of the assignees, or of any purchaser from them of any part of the bankrupt's estate, (if the bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity) order the bankrupt to join in any conveyance of such estate, or any part thereof; and though he should fail to comply with such order, the bankrupt, nevertheless, and all persons claiming under him, will be estopped from objecting to the validity of such conveyance; and all estate, right, or title of the

Lord Chancellor may order bankrupt to join in any conveyance.

(1) *Charman v. Charman*, 14 Ves. 580.

(2) *Ex parte Beddom*, 1 Rose, 310. *Ex parte Kirk*, Buck. 478.

bankrupt will be as effectually barred by such order, as if the conveyance had in fact been executed by him.

## SECTION II.

### *Of Copyholds.*

Copyholds to be conveyed by the commissioners to a purchaser.

In order to save the expense of more than one fine to the lord, upon the conveyance of the bankrupt's copyhold estate, that species of property is, as we have already seen (1), expressly excepted out of the general conveyance of the bankrupt's real estates to the assignees. For, if it was conveyed to them along with the freehold property, they could not make a good title to a purchaser, without first being admitted as tenants to the lord, and then surrendering to the purchaser; and as a fine is payable to the lord upon every admittance, there would thus be two fines paid, before the purchaser could be effectually admitted. This inconvenience was adverted to so long ago as in the time of Lord Hardwicke (2), who recommended the commissioners to do then, what they are now expressly directed to do by the provision of the present statute; — namely, to except the copyholds out of the general conveyance to the assignees, and to convey them to a purchaser in the first instance.

Thus, by the 68th section of the new act, the commissioners are directed, by deed indented and enrolled in any court of record, to make sale, for the benefit of the creditors, of any copyhold (3), or customaryhold lands, or of

(1) Section 64. ante, 348.

(2) *Drury v. Mann*, 1 Atk. 96.; and see ex parte *Harvey*, Buck. 443. Ex parte *Holland*, 4 Mad. 483. The practice adopted in consequence of this recommendation of Lord Hardwicke, seems, nevertheless, to have been incorrect, according to the strict construc-

tion of the 5 G. 2. c. 30. s. 26.; by which the commissioners were directed to assign *all* the bankrupt's estate to the assignees. And see 1 Christian's B. L. 15. 472.

(3) Of all the former bankrupt acts previous to the 5 G. 4. c. 98. copyholds were only expressly named in the 15 Eliz. c. 7. s. 3.

any interest to which the bankrupt is entitled therein, and thereby to entitle or authorise any person on their behalf, to surrender the same for the purpose of any purchaser being admitted thereto. *Copyholder.*

And for the protection, also, of the lord, of whom such copyhold estates are held, it is enacted, that every such purchaser shall, before he enter into or take any profit of the same, agree and compound with the lord for fines, dues, and other services, as theretofore have been usually paid for the same; — who shall thereupon, at the next or any subsequent court to be holden for the manor, grant unto such vendee upon request the said copyhold lands, for such estate or interest as shall have been so sold to him, reserving the ancient rents, customs, and services, and shall admit him tenant of the same. Purchaser to compound with lord for fines, and then to be admitted.

If the vendee tenders to the lord a competent fine, which the lord refuses, and will not admit, the vendee may nevertheless enter (1) without admittance; for though a purchaser cannot in general enter and take the profits before admittance, yet this is only a regulation for the benefit of the lord, — the estate being out of the bankrupt immediately by the bargain and sale, and vesting in the purchaser when admitted, by relation from the bargain and sale, so as to avoid any intermediate claims. Thus, if the bankrupt die between the bargain and sale and the admittance of the purchaser, and the custom of the manor is, that the wife of any copyholder dying *tenant*, shall be entitled to her freebench, yet the wife of the bankrupt in this case will not be entitled to be so endowed. (2) When may enter without admittance.

And where a bankrupt was entitled to a copyhold estate — under a devise to testator's wife for life, remainder to the bankrupt and the heirs of his body, with remainder over in case the bankrupt should die without issue, or should not survive his mother — and there was no custom in the manor to entail copyholds — and the bankrupt survived his mother Relation of the bargain and sale.

(1) Stone, 127.

(2) *Parker v. Blecke*, Cro. Car. 568. Sir W. Jones, 451.

**Copyholds.** and had issue, but died without being admitted, and before any bargain and sale was executed by the commissioners, — it was held, that the bankrupt took, under these circumstances, a fee simple conditional at common law; and that the commissioners might execute a valid conveyance of the estate, notwithstanding his death, pursuant to the provision of the 1 Jac. 1. c. 15. s. 17. (contained in the 26<sup>th</sup> section of the new statute), which authorises the commissioners to proceed in the commission, when the bankrupt dies after adjudication, as they might have done if he were living. (1)

### SECTION III.

#### *Of Mortgages.*

Assignees  
may  
tender  
money  
due on  
mortgage.

By section 70. of the new act, if the bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or have deposited any deeds upon condition, or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money, or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment, or performance, may sell and dispose of such real or personal estate for the benefit of the creditors.

But must  
pay in-  
terest up  
to redemp-  
tion.  
Where  
two mort-  
gages.

The assignees have always been considered, to be entitled to the equity of redemption of a mortgage made by the bankrupt. (2) But they cannot redeem, without paying interest up to the time of redemption. (3) And where a bankrupt made two mortgages to the same mortgagee of two several estates, and one of the estates was deficient in value, and the assignee filed a bill to redeem one mortgage only, the

(1) *Doe v. Clark*, 5 B. & A. 458.

(2) *Vandenanker v. Desbrough*,  
2 Vern. 96.

(3) 7 Vin. Ab. 100.

Court said, that if the assignee would redeem one, he must redeem both. (1)

*Mortgages.*

If a tenant in tail makes a mortgage for years, and after becoming bankrupt dies without having suffered a recovery, his assignees are entitled to the estate free of the mortgage; for a tenant in tail, without suffering a recovery, can only affect the estate for his life; and after his death the mortgagee's title is consequently at an end. (2) But, if the mortgage deed in such a case contain a covenant for further assurance, — it has been held, that the mortgagee would then be entitled to retain his security against the assignees; on the principle, that they are bound by the same equity as the mortgagor. (3)

Where tenant in tail mortgages, without suffering a recovery.

Where a bankrupt deposits a lease as a security for money, without making any mortgage or assignment of it, the *legal estate* is strictly vested in the assignees. (4) But, as such a deposit amounts to an equitable mortgage, and the assignees have no right to the estate until the money is repaid (5), the Lord Chancellor will, on petition of the creditor, prevent the assignees from disposing of the legal estate to his prejudice, and will order the lease to be sold for the benefit of the creditors, in the same manner, as in the case of a legal mortgage. So where a bankrupt had mortgaged copyhold lands — but the surrender was neglected to be presented within the time limited by the custom, and the bankrupt afterwards died, — the Court of

As to an equitable mortgage.

Where copyholds mortgaged without surrender.

(1) *Pope v. Onslow*, 2 Vern. 286.; and see *Wilks v. Lugg*, 2 Eden's Rep. 78. note.

(2) *Beck v. Welsh*, 1 Wils. 276.

(3) *Pye v. Daubuz*, 3 Bro. 594. *Edwards v. Applebee*, cited 2 Bro. 652. This distinction, as Sir W. Evans has justly observed, does not seem in practice to be very important, as there is never any *legal mortgage* without a covenant for further assurance; and an *equi-*

*table mortgage* is, *ex vi termini*, held to imply, an agreement to do all legal acts to give validity to the assurance. See Evans's Bankrupt Statutes, 73. note (11).

(4) *Mastair v. Roe*, 5 Esp. 105.

(5) *Russel v. Russel*, 1 Bro. 269. and cases there cited. *Ex parte Coming*, 9 Ves. 115. *Ex parte Weatherall*, 11 Ves. 398. *Ex parte Haigh*, *ibid*, 403.

**Mort-  
gages.**

Chancery would not permit the assignees to take advantage of the defect. (1)

**When  
mortgages  
not en-  
titled to  
crops.**

When the mortgagor in possession is, by express contract, tenant at will to the mortgagee, it has been held, that the mortgagee is not entitled to the crops upon the mortgaged premises, at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners. (2)

**Where as-  
signees of  
mortgagor  
not obliged  
to refund  
rent.**

And where the tenant in possession of mortgaged premises paid rent to the assignees of the mortgagor, though after notice to pay rent to the mortgagee, — the Court refused to compel the assignees to refund; for a mortgagor, receiving rent, has never been considered a trustee for the mortgagee. (3)

**As to ap-  
plication  
for an im-  
mediate  
decree to  
redeem.**

Where the mortgagor becomes bankrupt after a bill of foreclosure is filed against him, and then a supplemental bill is filed against him and his assignees, — the Court will not, on the application of the assignees alone, make an immediate decree under the 7 G. 2. c. 20. s. 2., as to the right of redemption, on payment of principal and interest due on the mortgage. (4)

For further information as to creditors holding a legal or equitable mortgage, the reader is referred back to Chapter IX. Section 6., where the subject has been already fully considered.

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#### SECTION IV.

##### *Of Offices.*

**An office  
assignable,  
unless it  
concerns**

The commissioners may make sale of offices of inheritance and terms of years, which are held by the bankrupt at the time of his bankruptcy, and from which any benefit

(1) *Taylor v. Wheeler*, 2 Vern. 565.

(2) *Ex parte Temple*, 1 G. & J. 216.; and see *Hodgson v. Gascoigne*, 5 B. & A. 88.

(3) *Ex parte Wilson*, 2 V. & B. 252. 1 Rose, 444.

(4) *Garth v. Thomas*, 1 Sim. & S. 188.

is derived, except offices touching or concerning the administration or execution of justice; — which latter description of offices are expressly prohibited to be sold by the 5 & 6 Edw. 6. c. 16. The proper course of proceeding in these cases (as recommended by Lord Hardwicke) is for the assignees to settle the price with a purchaser, and then to propose him for the approval of the person having the power of admission, — upon which the bankrupt must surrender the office in his favor; otherwise the Lord Chancellor will compel him to do so, under pain of imprisonment. (1)

Offices.

the administration of justice. Mode of proceeding.

The place of *under-marshal* of the City of London, which is merely an office of police, and which was purchased by a bankrupt, and held *quamdiu se bene gesserit*, has been held to be assignable. (2) So, also, the place of one of the *gentlemen pensioners* (3), as well as the office of taking care of the palace and House of Lords, have been holden liable to creditors. (4)

What assignable.

But the office of *serjeant at arms* of the City of London, though it is purchased for a sum of money, and is also holden *quamdiu se bene gesserit*, has been determined to be not assignable (5), on the ground of its being one that concerned the administration of justice. (6) And the same, with respect to the office of one of the sworn clerks of the *six clerks'* office. (7) So, the full pay or half pay of an *officer in the army* (8) has been held to be not assignable,

What not assignable.

(1) 1 Atk. 210. Ambl. 73. 1 C. B. L. 283.

(2) Ex parte *Butler*, 1 Atk. 210. 215. Ambl. 73.

(3) Ex parte *Joynes*, 1 C. B. L. 283. Ex parte *Gilbee*, *ibid*.

(4) *Scheffing v. Blackerby*, 1 Ves. 347.

(5) 1 Atk. 212.

(6) Not more, however, it is apprehended, than that of *under marshal*; for an office of POLICE seems as much connected with the administration of justice, as an

office like that of *serjeant at arms*; one may be considered a *criminal*, and the other a *civil* office.

(7) *Bristow's case*, 1 Atk. 212.

(8) Mr. Justice Buller, in one case (*Flarty v. Odium*, 5 T. R. 681.) seemed to think, that though an officer could not assign his pay, yet he might assign such *arrears* of it as were actually due; but in *Cathcart v. Blackwood*, (*infra*.) it was principally the *arrears*, that seemed to have been in question.

and this upon principles of public policy. (1) The place of a *jew broker*, also, in the city of London, has been holden not assignable; — though this was considered to be no *office* at all — such a person being merely one of a particular description, and of a limited number, who are licensed as brokers by the Court of Aldermen. (2)

## SECTION V.

### *Of Advowsons.*

Commissioners may sell an advowson, or next presentation, unless the church be void.

Where the patron of a living becomes bankrupt, the commissioners may sell the *advowson*; — and so with respect to a right of next *presentation* to a living. But if the church be void, then the presentation cannot be sold; for the void turn of a church is not *valuable* (3); and the bankrupt, therefore, in that case is entitled to present. For the 77th section of the new statute, enabling assignees to execute powers (4) vested in the bankrupt, contains an express exception of the right to nominate to any vacant ecclesiastical benefice.

If a clergyman be bankrupt, his living is liable to a sequestration; and the proceeds are distributable amongst his creditors. (5)

(1) *Cathcart v. Blackwood*, 1 C. B. L. 284. In re *Kennedy*, ib. And see *Flarty v. Odium*, 3 T. R. 681. *Lauderdale v. Duke of Montrose*, 4 T. R. 248. *Barwick v. Read*, 1 H. B. 627. *Stone v. Lidderdale*, 2 Anst. 533. Contra *Stuart v. Tinker*, 2 Bl. 640. as to cases of insolvent debtors. But now by the last Insolvent Act, (7 G. 4. c. 57. s. 29.) a certain portion only of the pay of an insolvent officer in the army, or navy, can be assigned under particular restrictions, for the benefit of his creditors.

(2) Ex parte *Lyons*, Amb. 89.; and see an able note of Sir W. Evans, in his Collection of the Statutes on Bankruptcy, B. L. 15. as to what offices are and are not assignable under a commission, in which he expresses a doubt that Lord Hardwicke's decision in ex parte *Butler*, *supra*, will not stand the test of fair and deliberate judicial inquiry.

(3) Gibs. 794. 1 Burn's Ecclesiastical Law, 125.

(4) See post, 362.

(5) Ex parte *Meymott*, 1 Atk. 200.; but see ante, p. 20.



## SECTION VI.

*Of Reversions.*

As the commissioners are by *section 64.* (1) empowered to convey all the *interest*, to which any bankrupt is entitled in any lands or hereditaments, and which he may by law dispose of, — it seems to follow, that they may convey a *reversion*, or *remainder*, of the bankrupt (as well as lands in possession), or indeed any future interest which is vested in the bankrupt at the time of the issuing of the commission — such as a term to commence *in futuro.* (2)

And the *65th section* of the new statute, as has been already stated (3), expressly enables the commissioners, in the case of an estate tail of the bankrupt, to make sale of any reversion, or remainder, of such estate, whereof no reversion or remainder is in the crown.

## SECTION VII.

*Of Powers.*

When a *power of appointment* was vested in a bankrupt, it seems to have been for some time a point unsettled, whether the bargain and sale of the commissioners had the same operation, as a due execution of the power by the bankrupt. (4) In one case it was decided, that a bankrupt, who has an absolute power of appointment, could not be compelled by a decree, on a bill in equity filed against him, to execute such power in favour of his assignees. (5) In a subsequent case, however, in the King's Bench, where the bankrupt was seised of a life estate with

Former  
uncer-  
tainty as  
to the  
vesting of  
powers in  
the as-  
signees.

(1) Ante, 348.

(2) 2 Com. Dig. 25. Good, 88.

(3) Ante, 352.

(4) Sugden on Powers, 154.

(5) *Thorpe v. Goodall*, 1 Rose, 43. 17 Vcs. 270.

**Possibility.** — and assign the bankrupt's property, — that the construction of the new statute will be as extensive in this respect, as if those words had been retained in it.

A possibility assignable.

But, as a possibility (coupled with an interest) is by law devisable (1), it would seem to follow on that ground alone, that it may be also assigned, with the other disposable property of a bankrupt, for the benefit of his creditors. And, where there was a devise to such of the children of A. as should be living at her death — and A. had issue (amongst others) B., who became a bankrupt, and got his certificate allowed — after which A. died, — it was held, that the assignees in this case were entitled to the bankrupt's interest; for that he himself might in his mother's lifetime have released such interest, — and that the commissioners were therefore enabled to assign it. (2)

But not a mere expectancy of inheriting an estate.

The possibility, however, must be such an interest as *can* be assigned, or released. Therefore the mere possibility, or *expectancy*, of inheriting an estate generally as heir at law — there being no *persona designata* — cannot be assigned by the commissioners. So that if an estate, under these circumstances, comes to the bankrupt after he has obtained his certificate, neither the commissioners, nor the assignees, have any control over it. (3) But, if the estate descends to him *before his certificate*, it will, in that case, pass to his assignees under the 64th section of the new act.

A *policy of insurance* effected by a bankrupt on his own life, passes to his assignees, however small the apparent value of it may be. (4)

(1) *Roe dem. Perry v. Jones*, 1 H. B. 30. and see *Carleton v. Leighton*, 3 T. R. 88. 5 Meriv. 671.

(2) *Higden v. Williamson*, 3 P. Wms. 132.

(4) *Schondler v. Wace*, 1 Camp. 487.

(3) *Moth v. Frome*, Ambl. 394.;

## SECTION IX.

*Of a voluntary Conveyance.*

(And see post, 380. as to *Personal Property fraudulently delivered in contemplation of bankruptcy.*)

By the 73d section of the new act, if any bankrupt, *being at the time insolvent* (1), shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, &c., the commissioners have power to sell and dispose of the same; and such sale is declared to be valid against the bankrupt, and such children and persons claiming under him.

Conveyance by bankrupt without consideration, (being at the time insolvent) void.

A voluntary settlement, or purchase, for a *wife*, made *after* marriage, has been held to be included in this power given to the commissioners, upon the construction of the words “children or *any other person*,” — which are copied by the above section, from a former (2) act. And where a deed, by which the bankrupt conveyed his real estate to trustees for the benefit of his wife and children, was expressed to be made “in consideration of 5s. and *other valuable considerations*,” — Lord Hardwicke said, that this

A voluntary settlement on a wife *after* marriage, within the above section.

(1) These words were not in the 1 Jac. 1. c. 15. s. 5., from which this section is taken, and which applied to *all* cases of a conveyance without consideration, whether the bankrupt was insolvent or not at the time. So that, before the present statute, in order to make a transaction of this kind void against creditors, it was not essential, that the party making the conveyance should have been indebted at the time; (*Fryer v. Flood*,

1 Bro. 160. *Glaister v. Hewer*, 8 Ves. 195. 9 Ves. 12. 11 Ves. 377.) though it was, of course, necessary, as it is now, that he should have been then a *trader*. *Crisp v. Pratt*, Cro. Car. 548. *Lilly v. Osborne*, 3 P. Wms. 298.; and see *Picklock v. Lyster*, 2 M. & S. 371. *Goss v. Neale*, 5 Moore, 19.

(2) 1 Jac. 1. c. 15. s. 5. *Tucker v. Cosh*, Styles, 288. *Glaister v. Hewer*, 8 Ves. 195. 9 Ves. 12. 11 Ves. 377.

**Voluntary conveyance.**  
—

did not oblige the Court to hold it, at all events, to be for a valuable consideration, — and could at most only admit the party into proof, that there were other valuable considerations; and he decreed that the trustees, in this case, should convey to the assignees (1) of the bankrupt.

**Deed made by executrix to cestui que trusts, when good.**

Where a deed was made by an executrix before an act of bankruptcy, for securing out of the trust monies (in her hands at the time of the deed) the fortunes of the *cestui que trusts*, — it was held good against creditors. (2) But where an administrator executed a conveyance to two persons, for the payment of 1500*l.* each (given to them by the intestate) it was held fraudulent as against creditors, — unless it could be proved, that the administrator had assets in his hands belonging to the intestate, at the time of executing the conveyance. (3)

**Conveyance made when party not indebted, not fraudulent.**

If a trader make a voluntary conveyance, in consideration of natural affection, and he be *not indebted* at the time to any person, nor in treaty with any one for the sale of the lands conveyed, — such a conveyance, it has been held, would have no badge of fraud about it; but if the party be indebted, or in treaty at the time for the sale of the lands, it would then be considered fraudulent. (4) A conveyance, also, made to secure the debt of another person, is not fraudulent against creditors. Therefore, where a father, at the request of his son, executed a mortgage to secure a debt due from the son to the mortgagee, — the Vice-Chancellor held, that this was not a voluntary conveyance without consideration. (5)

**Voluntary conveyance good, except against creditors.**

A voluntary conveyance, though void as against the creditors of a bankrupt, has been holden good for all other purposes. (6) And a voluntary bond, being valid as between the parties, when it is surrendered by the obligee for a substituted bond from the obligor, has been determined to be a good consideration for such substituted

(1) *Walkerv. Burrows*, 1 Atk. 93.

(2) *Cock v. Goodfellow*, 10 Mod. 490.

(3) *Bateman's case*, 1 Mod. 76.

(4) *Style*, 446.

(5) *Ex parte Hearn*, Buck. 165.

(6) *Ex parte Bell*, 1 G. & J. 282.

bond, even against creditors, — unless, indeed, the bond was given with a fraudulent design to substitute a valid, for an invalid, security. (1)

## SECTION X.

### *Of an executory or beneficial Contract.*

There is some difficulty (from a review of the cases in the books) in determining what interest the assignees take in a covenant, or agreement, entered into by a lessor with the bankrupt for the renewal, or the granting, of a lease. In one case, it was held, that the assignees were not entitled to the specific performance of such an agreement (2) But this appears to have been decided principally upon the authority of another case, which has been since very much impugned, — and in the report of which there are indeed two wholly contradictory statements. In one of these (3), it is laid down, that equity will not compel a lessor, who had covenanted with a bankrupt to renew a lease, to renew in favour of the assignees; and in another report of the same case (4), it is stated to have been holden, that such a covenant *was assignable* in law. In a subsequent case (5), Mr. Justice Buller doubted the authority of the first mentioned report of this case, and said he did not see why a covenant for the renewal of a lease, of which a profit might be made, might not be assigned; and Mr. Justice Heath said, that he thought the case cited from Vernon a very strange one; for, that a covenant to renew a lease ran with the land.

Whether  
a cove-  
nant to  
renew or  
grant a  
lease,  
passes to  
the assign-  
ees.

(1) *Ex parte Berry*, 19 Ves. 218. 1 Ch. Ca. 71. 1 Nels. 102. 1 Eq.

(2) *Moyes v. Little*, 2 Vern. 194. Ab. 53.

(3) *Drake v. Mayor of Exeter*,

(4) *Ibid. Freeman*, 183.

(5) *Smith v. Coffin*, 2 H. B. 444.

Executory contract.

Bankruptcy, indeed, does not seem to operate as an *actual discharge* of such a contract; though it may depend upon many circumstances, whether a court of equity will decree a specific performance of it in favour of the assignees. (1) In one case it was said, that a specific performance would not be decreed, merely to give up the house to the assignees. (2) And Sir William Grant, in a more recent case, (in which, however, the point was not expressly before him) doubts whether assignees could compel a landlord, specifically to perform an agreement to grant a lease to a (3) bankrupt — particularly where such an agreement contained a stipulation, that the intended lessee should not assign. Lord Loughborough also observed in *Brooke v. Hewitt*, that it must be a very strong case, that would induce the Court to carry into execution an agreement between landlord and tenant, (the estate not being executed at law,) where the person, who was to become the tenant, had become a bankrupt; and he added, that in such a case, the Court would consider, whether it would put any terms upon the assignees to make them do equity, and dispose of the lease to a proper and responsible person; and that, as the covenant of the bankrupt must, of course, be of less value than if his bankruptcy had not intervened, the assignees would be ordered to enter into all the covenants. (4)

## When lease for the personal accommodation of bankrupt.

If, however, a party contract to grant a lease, merely for the *personal accommodation of the bankrupt*, then it is clear, that the assignees are not entitled to the specific execution of it; for to hold the contrary would be against the manifest intention of the parties, as well as the justice of the case, in that particular instance. (5)

## When bankrupt

With respect to any contract, which the bankrupt may have entered into, for the PURCHASE of any estate or interest

(1) *Brooke v. Hewitt*, 3 Ves. 253.(2) *Willingham v. Joyce*, 3 Ves. 168.(3) *Weatherally. Geering*, 12 Ves. 513.

(4) 3 Ves. 253.

(5) *Flood v. Finlay*, 2 Ball & B. 9.

in land, it is provided by the 76th section of the new act, that the vendor, or any person claiming under him, (if the assignees shall not, upon being required, elect whether they will abide by and execute such agreement, or abandon the same) may apply by petition to the Lord Chancellor; who may, thereupon, order the assignees to deliver up the agreement, and the possession of the premises to the vendor, or person claiming under him, or may make such other order as he shall think fit. As to any agreement, therefore, of the bankrupt for the *purchase* of lands or tenements, — there can be no doubt, (from the wording of the above section,) that it admits a right in the assignees to enforce the performance of a contract of this description against the vendor, if it is thought beneficial to the interests of the creditors to do so.

*Executory contract.*

has entered into an agreement for the *purchase* of lands, assignees may elect, whether to fulfil the agreement or not.

The provision also, as to the election of the assignees in the above section, appears to proceed upon the broad principle, that they are entitled to the benefit of *every* covenant or agreement of any description made with the bankrupt (1) before his bankruptcy. Accordingly, it has been holden, that lands previously articked to be *sold* by a bankrupt pass to the assignees, together with the benefit of the contract, and that they can compel the purchaser to a specific performance (2); and unsatisfied judgments against the bankrupt, in such a case, have been also holden to be inoperative against the title. So, where the bankrupt had made a conveyance of all his property to trustees for the benefit of his creditors, under which the trustees contracted to sell certain lands to the defendant — and afterwards filed a bill against him for specific performance — but before answer, a commission of bankruptcy was issued out against the bankrupt — upon which his assignees filed a supplemental bill to enforce the contract; — it was held in this case, that though the conveyance to the trustees was itself an act of bank-

Assignees entitled to benefit of contract for sale.

(1) And see *Whitworth v. Davis*, 1 V. & B. 145. *Sloper v. Fish*, 2 V. & B. 145. (2) *Sharpe v. Roahde*, 2 Rose, 192.

Executory contract.

ruptcy, yet that the assignees might compel the performance of the contract made under it. (1) It seems, too, that the assignees may adopt any contract which the bankrupt enters into even *after* the act of bankruptcy (if such contract be beneficial to the estate), and may enforce it against the person who has so contracted with the bankrupt. (2)

## SECTION XI.

### *Of the Estate of the Wife, and Property settled by the Bankrupt on his Wife and Children.*

Assignees have the same title as the bankrupt.

The assignees are entitled to the same interest in all the property of the *wife* of the bankrupt, as he himself possessed at the time of his bankruptcy. For the sake of compendiousness, it is proposed to include in this section the consideration of the law, as it affects both the *Real*, and *Personal*, estate of the wife.

And *first*, as to her *Real estate* : —

If the bankrupt be seised of lands in right of his wife, the assignees are entitled to them during the coverture. (3)

As to the wife's dower.

When the wife, however, is entitled to *dower* in her husband's lands, this right is not affected in any way by the commissioners' assignment. (4) And a provision made previous to the marriage in bar of dower, if precarious and uncertain, does not bar the wife. As, where it was provided by a settlement, that the wife should be entitled to such personal estate as the husband *might die possessed of*, according to the custom of London; and the husband afterwards became bankrupt, the wife was held entitled to dower in this case against the claim of the assignees. (5) But where a bankrupt, before he was seised in possession

(1) *Goodwin v. Lightbody*, 1 Daniell, 153.

(2) *Butler v. Carver*, 2 Star. 435.

(3) 2 Com. Dig. Bankrupt D. 11.

(4) *Good*, 90. *Stowe*, 163.

(5) *Smith v. Smith*, 5 Ves. 189.



of lands, made a voluntary settlement of them after his marriage, in trust for his wife and children, — it was held, that the settlement, though void against creditors, subsisted for the benefit of the wife and children in the event of any surplus, and that the wife (never having been entitled to dower in these lands, by reason that the settlement was made before the husband was seised of any estate in possession) could not claim dower against the creditors by force of the bankruptcy. (1)

Wife's  
estate.

Where lands are devised in fee to the wife *for her separate use*, though there are no trustees appointed, yet the devised premises are not subject to the bankruptcy of her husband; for the testator, having a power to devise the premises to *trustees* for the separate use of the wife, the Court, in compliance with his declared intention, will supply the want of them, and make the husband trustee. And in such a case, as the assignees (who claim under the husband) can have no better right than he had himself, the Court will order them to join in a conveyance to a trustee, for the separate use of the wife. (2) In all cases, indeed, where the bankrupt would, from the circumstances, be considered as a trustee for his wife, his assignees will be held to be trustees in like manner. As where, in a marriage settlement, an estate was intended to be settled to the separate use of the wife during life, but by mistake was limited to the use of the husband for life — and the husband gave a note under his hand to the trustee, that the wife should take the estate to her separate use according to the original intention of the parties; — the Court held, in this case, that the assignees of the husband must be considered as trustees for the wife, as they took the estate subject to the same right as she was entitled to against the bankrupt. (3) And a Court of Equity will in every case supply legal defects in marriage articles executed by a

Where  
lands de-  
vised "for  
*separate*  
use of the  
wife."

Where  
husband  
considered  
a trustee  
for his  
wife, assign-  
ees will  
be so like-  
wise.

(1) *Ex parte Bell*, 1 G. & J. 283. 316. *Kirk v. Paulin*, 7 Vin. Ab. 95.;

(2) *Bennet v. Davis*, 2 P. Wms. and see post, 577. et seq.

(3) *Tyrrell v. Hope*, 2 Atk. 557.

Wife's  
estate.

trader, and compel assignees to carry the articles into execution. (1) Thus, where a settlement was by lease and release, and the lease for a year was lost, — the settlement was nevertheless held good against the assignees of the husband; as the release amounted to a covenant to stand seised. (2)

Where  
settlement  
good  
against  
assignees.

Where the wife's fortune was by articles *before* marriage settled to the use of the bankrupt for life — but if he failed in the world, the trustees were then not to pay the proceeds to him, but apply it to the separate maintenance of the wife and children, — the Court held, that the settlement was good against the assignees, it not being a provision out of the bankrupt's estate, but the settlement of *her own* property. (3) But where the wife's estate was by settlement vested in trustees, to assign after the marriage a part to the husband, and in the event of her dying in his lifetime without issue, then to be divided in a particular mode — and the husband covenanted, that in that event, he would within three months after her decease transfer 500*l.* to the trustees, for the sole use of her next of kin — but he became a bankrupt in her lifetime; — it was held, in this case, that the 500*l.* (so covenanted to be transferred) being only contingent at the time of the bankruptcy, the whole of the trust fund vested in the assignees — and that they were not subject to any equity for the payment of the 500*l.* (4)

Where  
not bind-  
ing on  
them.Wife en-  
titled to  
proper  
main-  
tenance out  
of her own  
property.

The wife of a bankrupt has, in equity, a right in all cases to an adequate provision out of her own property. Therefore, where such property cannot be got at by the assignees without the intervention of a Court of Equity, the Court will compel them to make a competent settlement upon her (5), before it will permit them to get possession of

(1) 2 Atk. 557. *Brown v. Jones*, 1 Atk. 188. *Jordan v. Savage*, 2 Eq. Ca. Ab. 102. *Bosvil v. Brander*, 1 P. Wms. 459.

(2) *Brown v. Jones*, *supra*.

(3) *Lockyer v. Sanage*, 2 Str. 946.

(4) *Brandon v. Brandon*, 3 Swanst. 327.

(5) *Parker v. Dykes*, Davis, 281.

*Holland v. Culliford*, 2 Vern. 662. *Jacobson v. Williams*, 1 P. Wms. 382. *Bosvil v. Brander*, *ibid.* 458. *Grey v. Kentish*, *ibid.* 280. *Jewson v. Moulson*, 2 Atk. 417. *Worrell v. Marlar*, cited 1 P. Wms. 459. *Cox*, 153. 2 Dick. 647. *Pryor v. Hill*, 4 Bro. 139. *Watson v. Marcall*, cited 1 P. Wms. 458. *See*

the property, — unless the wife be otherwise properly provided for. And though a settlement has been made, previous to the marriage, of part of the wife's property to her separate use, it does not bar her claim to a further settlement out of newly acquired property. (1) The practice in these cases has been, to refer it to the Master to settle what is a proper maintenance, — having regard, on the one hand, to any prior settlement of other property made by the husband — and on the other, to any other property possessed by the husband in right of his wife. (2) This equity of the wife (to a provision out of her property) attaches on the filing of the bill, which gives a Court of Equity jurisdiction over the property. (3) And where the property is a subject of *equitable* cognizance, it does not seem to be material, whether the wife, or the husband, or his representatives, or general assignees, come for the aid of the Court. (4) If the entire property, or that portion of it which exists at the time of her husband's bankruptcy, is not more than sufficient to maintain her, the Court has in some cases ordered her to receive the whole for her separate use, — as in the case of an annuity, to which she is entitled at the time of the bankruptcy. (5) But where it is more than sufficient for her maintenance, in no case will the whole be given (6); but the property, in that event, has been frequently divided equally between the wife and the assignees. (7)

*dington v. Kinsman*, 1 Bro. 44. *Freeman v. Parsley*, 3 Ves. 421. *Pringle v. Hodgson*, *ibid.* 617. *Brown v. Clark*, *ibid.* 166. *Lumb v. Milnes*, 3 Ves. 517. *Harrison v. Buckle*, 1 Str. 258. *Adams v. Peirce*, 3 P. Wms. 19. *Ex parte Beilby*, 1 G. & J. 167. *Ex parte Hall*, *ibid.* *Carr v. Taylor*, 10 Ves. 574. *Bassivi v. Serra*, 3 Meriv. 674.

(1) *Burdon v. Dean*, 2 Ves. 607.

(2) *Green v. Otte*, 1 Sim. & St. 960.

(3) *Steinmetz v. Halkin*, 1 G. &

J. 64.; and see *Macaulay v. Phillips*, 4 Ves. 15. *Murray v. Lord Elibank*, 10 Ves. 90.

(4) See Mr. Cox's note, 1 P. Wms. 459. *Lord Elibank v. Montolien*, 5 Ves. 737. 1 Roper Husb. & W. 257.

(5) *Ex parte Coysegamé*, 1 C. B. L. 265. 1 Atk. 192. *Oswell v. Probert*, 2 Ves. 680.

(6) *Wright v. Morley*, 11 Ves. 20. *Beresford v. Hobson*, 1 Mad. 362. *Green v. Otte*, *supra*.

(7) *Worrall v. Marljar, Browne*

Wife's estate.

But this only a personal right of the wife's, and not extended to children.

It seems, however, that the Court of Chancery will not, *after the death of the wife*, extend this equity for a provision out of her estate to the issue of the marriage, where *no claim* has been made by the *wife* during her lifetime; for the right to such a provision is *personal* to the wife; — and the Court acknowledges no *original* title in the children — who can claim only that provision (1), which the wife thinks fit to secure to herself. She may, even at any time before the execution of the settlement (by consent in court) waive the settlement, and defeat the children. (2) But if she do not waive it, and the Court has *once jurisdiction* over the property by the filing of the bill (either by the wife, or by any other person (3)), the intended settlement will in that case, upon her death, enure for the benefit of her children. For an *actual settlement* is not necessary to give title to the children after the death of the wife: as, if there be a *decree* in a cause, referring it to the Master to approve of a proper settlement for the wife and children, and the wife die before any proceeding under the decree, the settlement must still be made for the children. (4) And it has lately been decided, that the filing of a bill by an executor, though the wife dies before answer, is sufficient to entitle the children to the benefit of the settlement. (5)

When assignees can get the property without the aid of a court of equity.

If the assignees, however, can get possession of the wife's property without calling for the interposition of a Court of Equity, it has been considered doubtful, whether the Court would, in such a case, interfere to assist the wife. (6) But the Court of Chancery has frequently granted injunctions, to stay proceedings of the husband in the Ecclesiastical

v. *Clarke*, *Carr v. Taylor*, *supra*.  
*Goose v. Davis*, cit. 1 Mad. 375.  
Ex parte *Newham*, 1 G. & J. 40.

(1) *Hearle v. Greenbank*, 3 Atk. 717. *Scriven v. Tubley*, Amb. 509.  
2 Eden, 337. *Lloyd v. Williams*, 1 Mad. 453.

(2) *Murray v. Lord Elibank*, 10 Ves. 88. 91.

(3) 1 G. & J. 64.

(4) Ibid. *Martin v. Mitchell*, cit. 10 Ves. 89. *Rowe v. Jackson*, 2 Dick. 604.

(5) *Steinmetz v. Halthin*, *supra*.

(6) *Adams v. Pierce*, 3 P. Wms. 11. *Willats v. Cay*, 2 Atk. 67.  
*Jewson v. Moulson*, 2 Atk. 420.  
*Milner v. Colmer*, 2 P. Wms. 641.  
*Winch v. Page*, Bunb. 80. Prec. Ch. 548.

Court, for the recovery of a legacy to the wife, until a proper settlement has been made. (1)

*Wife's  
estate.*

Where a settlement is made of the husband's property upon the wife *before* marriage, it will be good against the assignees, — for marriage itself is a consideration; and it is equally good, if made *after* marriage, provided it be upon payment of money as a portion — or even in consideration of an agreement to pay money, if it be afterwards paid pursuant to the agreement. (2) And if a bankrupt, previous to his marriage, covenant to settle specific lands upon his wife, and die without performing the covenant, the Court will compel the assignees to carry the (3) settlement into execution.

When  
settlement  
of hus-  
band's  
lands, good  
against  
assignees.

Where a man, who is *not a trader, and not indebted at the time*, purchases lands and settles them to himself, and his wife and children — and afterwards enters into trade and becomes bankrupt — the settlement, in such a case, is good against the creditors. (4) But, where a purchase was made by *a trader who was indebted* at the time, in the joint names of himself and his wife, and he afterwards became a bankrupt, — the wife, in this case, (before the new statute) was holden not entitled to any interest in the property. (5) And so, where the purchase was made even with the wife's money, if it was previously received by him, and disposable as his own, and the receipt of the money was not connected with the purchase, nor the husband bound by any agreement with a trustee. (6)

Settle-  
ment by a  
party not  
a trader,  
and not  
indebted,  
good.  
Contrà,  
where  
indebted.

But now it is apprehended that, to bar the claims of the wife, the party must not only be *indebted*, but must also be *insolvent* at the time of the purchase, according to the construction of the 73d section of the new statute, —

But now  
must be  
*insolvent*  
also at the  
time.

(1) *Gardner v. Walker*, 1 Str. 503.  
*Jewson v. Moulson*, supra.

(2) *Brown v. Jones*, supra, 1 C.  
B. L. 262.

(3) *Jordan v. Savage*, 2 Eq. Ca.  
Ab. 102

(4) *Crisp v. Pratt*, Cro. Car. 540.  
*Lilly v. Osborn*, 2 P. Wms. 298.

(5) *Glaister v. Hewer*, 8 Ves.  
195. *Tucker v. Cosh*, Style, 289.;  
and see ante, 365.

(6) 8 Ves. 195.

Wife's  
estate,

which makes a material alteration in the law in this respect. (1) And it would seem also, from the preceding cases (2), that where the purchase is made with the wife's money, she would have an equity to some sort of a provision.

Where a  
covenant  
in deed of  
separation  
good  
against  
creditors.

Where, by a deed of separation, the bankrupt had covenanted with a trustee for his wife, (in consideration of being indemnified from all debts and engagements, that might be contracted by her during the separation) to release his remainder in fee in certain estates (of which he was tenant for life), to certain uses for the benefit of the wife, — it was held, that such a covenant being made with a third party was binding in equity, and that it might be supported against creditors, by the consideration of indemnity against the wife's debts and engagements. (3)

## 2. *As to the Personal Estate of the Wife.*

Chose in  
action.

A *chose in action*, to which the wife was entitled before marriage, passes to the assignees by the assignment, as well as all debts due to her *dum sola* (4); and also stock in the public funds, which she was possessed of at the time of her marriage. (5) So, where the wife was a mortgagee in fee before marriage, the assignees will be entitled to the mortgage, for the right to the debt is vested in the assignees; and though the legal estate of the inheritance of the lands in mortgage continues in the wife, yet this is no more than a trust for the assignees, — in the same manner as where a mortgagee in fee dies, the mortgage money belongs to the executor, though the heir takes the legal estate by descent, — but with no other title than that of a trustee for the executor. (6)

(1) See ante, 365.

(2) Ante, 373.

(3) *Worral v. Jacobs*, 3 Meriv. 256.

(4) *Miles v. Williams*, 1 P. Wms. 349.

(5) *Pringle v. Hodgson*, 3 Ves. 617.

(6) *Bosvil v. Brander*, 1 P. Wms. 458.

It has been holden in some cases, that though the bankrupt die, before a *chose in action* (due to the wife *dum sola*) is reduced into possession, either by himself, or the assignees,—yet that the bankruptcy of the husband, and the assignment to the assignees, would amount to such a virtual reducing into possession, as would be sufficient to bar the wife's contingency of survivorship. (1) But in subsequent cases the contrary opinion has prevailed;—in one of which Sir W. Grant in an able judgment decided, that the wife was entitled by right of survivorship to a *chose in action*, under these circumstances, against the claims of the assignees. (2) And in a more recent case, where the wife had a reversionary interest in stock, and the husband took the benefit of the insolvent act—after which the person, on whose death the wife was to take, died—and then the husband died, without having done any act, either by himself or his assignees, to reduce the stock into possession,—it was held, that the stock survived to the wife. (3)

Wife's estate.

Whether chose in action survives to wife.

If a sum of money be bequeathed by a testator, in trust for the wife of a bankrupt, to be laid out and invested in a purchase for her “*sole and separate use*,” and to be settled after her death upon her children,—the commissioners cannot assign it; for it is not, in such a case, liable to the creditors of the husband. (4) So, if a legacy be left to the wife, directing “*her receipt to be a sufficient discharge*” to the executors,—that is, equivalent with saying to her sole and separate use. (5) So also a bequest, “*whenever she shall demand or require the same* (6);” or, “in trust to pay the annual produce into *her proper hands* (7);” or a legacy

When wife entitled to property bequeathed to her.

(1) 1 P. Wms. 458. *Pringle v. Hodgson*, supra.

(2) *Mitford v. Mitford*, 9 Ves. 87.

(3) *Hornsby v. Lee*, 2 Mad. 16. As to what acts of the husband amount to a reduction into possession of a wife's choses in action, see *Wildman v. Wildman*, 9 Ves. 174. *Nash v. Nash*, 2 Mad. 133. *Forbes*

*v. Phipps*, 1 Eden, 502. *Milner v. Milner*, 2 T. R. 627.

(4) *Vandenanker v. Desbrough*, 2 Vern. 96. Per Lord Hardwicke, 3 Atk. 709. *Bennet v. Davis*, 2 P. Wms. 316.

(5) *Lee v. Pricaux*, 3 Bro. 381.

(6) *Dixon v. Olmius*, 2 Cox, 414.

(7) *Hartley v. Hurle*, 5 Ves. 545.

Wife's  
estate.

“to be vested in trustees, the income to be for *her sole use and benefit* (1);” or a limitation in a settlement “for her *own sole use, benefit, and disposition* (2);” — have all been holden to give an estate to the wife, which does not pass to the assignees.

Where  
assignees  
entitled.

But a *clear intention* of the testator must appear in the language of the will, that the bequest is for her *separate use*, in order to prevent the husband's right from attaching; for a mere bequest to a married woman, “to and for her *own use and benefit*,” has been held not to amount to a *separate gift* to her (3); and a mere trust also to “*pay the interest to her for life*” has been determined not to be sufficient (4), — notwithstanding the property is bequeathed to the husband jointly with another trustee “*in trust for the wife*.” (5) Whether the gift of a particular fund to the *husband alone, in trust for the wife*, would be intended as a gift to her *separate use*, and a Court of Equity would prevent him from exercising his marital power, in prejudice of the trust, — was a question propounded in the last case by the Vice-Chancellor, but not determined. And, where there was a bequest of the *interest* of personal property between the wife and her brother; and at her death one half of the principal to go to her children, and her *husband by no means to have any part*, — even, in this case, the *life interest* was holden not to be to her *separate use*, on the ground, that the excluding words in the bequest referred only to the last antecedent, viz. the *principal*. (6) But wherever the assignees may be entitled in right of the bankrupt to the property thus left to the wife, they will be compelled, in every case, to make a provision for her, before they can avail themselves of this interest taken by the bankrupt. (7) The share apportioned to the wife in these cases is generally one half of the legacy; which, if she has children, will be ordered to be

(1) *Adamson v. Armitage*, G. Coop. 283.

(2) *Ex parte Ray*, 1 Mad. 199.

(3) *Wills v. Sayers*, 4 Mad. 409.  
*Roberts v. Spicer*, 5 Mad. 491.

(4) *Lumb v. Milnes*, 5 Ves. 517.

(5) *Ex parte Beilby*, 1 G. & J. 167.

(6) *Brown v. Clark*, 3 Ves. 166.

(7) *Ibid.*; and see ante, 372.



settled on her for life, with remainder to the issue of the marriage. (1)

*Wife's  
estate.*

A divorce obtained by the wife after her husband's bankruptcy, does not entitle her in equity to the whole of a fund previously bequeathed to her, but which does not come into possession until after the bankruptcy, — although no settlement may have been made upon her at her marriage, and her husband then received a sum of money as a portion with her. But the Court in such a case will refer it to the Master, to approve of a proper settlement upon the wife, and direct him to have regard to the extent of the fortune received by the husband in her right. (2)

A divorce does not entitle the wife to the whole of a fund previously bequeathed.

The property of a *feme covert* sole trader, according to the custom of the city of London, does not pass to the assignees (3) of the husband. And where a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her business *separately* — and the husband did not intermeddle with them, — it was held, that such effects, though fluctuating, were not assignable by the commissioners; for that the husband had not, in such a case, the order and disposition of the property with the consent of the true owner; — the trustees being the legal owners, and they having given no consent for that purpose; and the wife's possession under these circumstances was held to be no evidence of fraud, — for she was considered but the agent of the trustees. (4)

*Feme  
covert sole  
trader.*

But where goods, the property of a widow and her children, were upon her second marriage assigned to trustees, in trust to suffer the husband to enjoy them, on condition that he should pay to the trustees (for the use of the children) 800*l.*, by yearly instalments of 100*l.*, from July

Where the wife's goods assigned to trustees, but left in possession

(1) 3 Ves. 166.; and *Ex parte O'Farrell*, 1 G. & J. 345.

(2) *Green v. Otte*, 1 Sim. & S. 250.

(3) *Lavie v. Phillips*, 3 Burr. 1776.

(4) *Jarman v. Woollaton*, 3 T. R. 618.; and see *Haselinton v. Gill*, *ibid.* 620. note (a).

Wife's  
estate.  
of the  
husband.

1789 — and he continued in possession of them till 1797, having paid only 250*l.* — and the *day before his bankruptcy*, the trustees repossessed themselves of the goods; — the Court held, that this was fraudulent against creditors, and that the assignees were entitled to the goods. (1)

As to di-  
vidends of  
stock re-  
ceived by  
trustees  
under a  
settle-  
ment.

Where the bankrupt is, under a marriage settlement, entitled to receive the dividends of stock for his life, the assignees in this case become entitled to them during the life of the bankrupt; and where the trustees under the settlement received the dividends after the bankruptcy, some of which they paid over to the wife of the bankrupt, it was held that the assignees might recover the total amount of such dividends from the trustees. (2)

Proceeds  
of bank-  
rupt's  
stock  
agreed to  
be settled  
before  
marriage,  
assignees  
not en-  
titled to.

A bankrupt *before* his marriage agreed by *parol*, to settle *all* his stock on his intended wife — which stock (it appeared afterwards) amounted then to 450*l.*, 3 per cents. — but in the articles executed in pursuance of such agreement before the marriage, and in the settlement executed afterwards, the stock was stated to be only 340*l.* in amount. This was clearly proved to have been a mistake, occasioned by the bankrupt having stated that amount as the *VALUE* of the stock, and the subscribing witness having inserted it as the gross amount of the stock itself. After the act of bankruptcy the mistake was rectified, by altering the sum in the articles and settlement; and those instruments were then re-executed by the bankrupt and his wife and the trustees. BEFORE the bankruptcy the whole stock was sold out by the bankrupt, and the amount paid to the trustees. Under these circumstances, it was held by the Court of King's Bench, that, however such an alteration might avoid the instruments — if done with the consent of all the parties interested — yet, inasmuch as one of the parties (the *fême covert*) was incapable of giving such consent, and as equity would probably set up again the destroyed instru-

(1) *Darby v. Smith*, 8 T. R. 82.

(2) *Allen v. Impett*, 8 Taunt. 263.

ments in her favor, the trustees (who had received the money when they existed in a valid form) were entitled to hold the value of the 340*l.* stock, subject to the purposes of the trust, and not for the benefit of the bankrupt's estate; but that the surplus beyond that amount, at law, belonged to the assignees, — by reason that the *agreement* before marriage for the settlement of the *whole stock* was not *evidenced by writing* pursuant to the statute of frauds (1), and was, under the circumstances, the subject only of equitable jurisdiction. (2)

Wife's  
estate.

(1) 29 Car. 2. c. 3. s. 4.

(2) *Shaw v. Jakeman*, 4 East, 801.

## PART II.

## OF THE ASSIGNMENT, AS IT AFFECTS THE PERSONAL PROPERTY OF THE BANKRUPT.

- SECT. 1. *Of the Personal Property in general.*  
 2. *Of Debts, and Choses in Action.*  
 3. *Of Leases, and Annuities, and herein of Forfeitures upon Alienation.*  
 4. *Of Property ABROAD.*  
 5. *Of Property in the Possession, Order, or Disposition of the Bankrupt as REPUTED OWNER.*  
     1. *What THINGS are within the Statute.*  
     2. *What POSSESSION is within the Statute.*  
     3. *Possession as Factor, Banker, or Broker.*  
     4. *Possession as Trustee, Executor, or Administrator.*  
 6. *Of Property fraudulently delivered in contemplation of Bankruptcy.*  
 7. *Of Goods in transitu, and herein of the Right of Stoppage.*  
 8. *Of Goods sent, but not accepted; and of Goods ordered, but not delivered.*  
 9. *Of Goods subject to a LIEN.*  
 10. *Of the Claims of the Crown.*

(See also post, "*Relation*," "*Actions*." And as to the operation of the assignment upon the joint property of a *partnership*, under a separate commission against one or more of the partners, see post, title "*Partners*.")

## SECTION I.

*Of the Personal Property in general.*

By section 63. of the new act, the Commissioners may assign to the Assignees, for the benefit of the creditors of

the bankrupt, all the *present* and *future* personal estate of the bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate. *Personal property in general,*

All property, therefore, of every description, which accrues to the bankrupt *before he obtains his certificate*, passes to the assignees. And this was indeed declared to be the law before the new act, — so that, even in a case where a lottery ticket was given to the bankrupt by a creditor, who had signed his certificate, as a mark of approbation of his conduct, and the ticket happened to be drawn a prize before the actual allowance of the certificate, the proceeds were claimed and shared by the creditors. (1)

All property, too, which other persons stand possessed of *in trust* for the bankrupt, passes to the assignees, — as a bond to pay a sum of money to the obligee, *in trust* for the bankrupt. (2)

The assignment is now exempted from stamp duty (3), but it is required to be entered of record (4) at the bankrupt office; otherwise it is not receivable as evidence in any court of justice. *Assignment.*

By section 80. of the new act, if the bankrupt shall have any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his name in his own right, the commissioners may, by writing under their hands, order the same to be transferred into the name of the assignees, and all dividends to be paid to them. This clause is an extension of the provision made in this respect by the 36 G. 3. c. 90., by which government stock was made transferable to the assignees upon petition to the Lord Chancellor; but as the transfer may be made now *Commissioners may order stock to be transferred to assignees.*

(1) Per Lord K.; 7 T. R. 296.  
and see post, 386.

(3) Section 98.

(4) See Section 96.

(2) *Gerard v. Aykmer*, Palm. 505.

*Personal property in general.*

Where stock claimed by other parties, ordered to be transferred into name of Accountant-General.

*Wearing apparel.*

*Penalty on persons concealing bankrupt's effects.*

*Reward to persons discovering them.*

by the order of the *commissioners*, the expense of applying by petition will be saved.

Certain stock standing in the name of a bankrupt, the dividends of which had not been claimed, was (under the 56 G. 3. c. 60.) transferred to the commissioners for the reduction of the national debt. The assignees of the bankrupt, by petition under the act, claimed the stock as part of the bankrupt's effects; and it was also claimed by another person, who insisted that the bankrupt was merely a trustee for him. Under these circumstances, a reference was directed to the Master to ascertain whose stock it was; and in the mean time the stock was directed to be transferred into the name of the Accountant-General. (1)

The assignees are not entitled to detain from the bankrupt any part of his *wearing apparel*, on the ground of its being *unnecessary*; for the bankrupt himself is to determine whether it is necessary or not, as he does so at the risk of an indictment for felony. (2)

By *section 120.* of the new act, any person wilfully concealing any real or personal estate of the bankrupt, who shall not within forty-two days after the issuing of the commission discover it to the commissioners or assignees, is liable to a penalty of 100*l.* and double the value of the estate so concealed; and any person who shall, after the time allowed to the bankrupt to surrender, virtually discover to the commissioners or assignees any part of the bankrupt's estate not before come to the knowledge of the assignees, is entitled to an allowance of 5*l.* per cent., and such further reward as the major part in value of the creditors present at any meeting called for that purpose shall direct.

(1) Ex parte *Gillet*. Ex parte *Bacon*, 3 Mad. 28.

(2) Ex parte *Ross*, 1 Ross, 53. 17 Ves. 374.

## SECTION II.

### *Of Debts and Choses in Action.*

By the 63<sup>d</sup> section the commissioners may also assign all debts due, or to be due, to the bankrupt, wheresoever the same may be found or known; and the assignment will vest the same in the assignees as fully, as if the assurance (whereby any of the debts are secured) had been made to the assignees themselves. And after the assignment, neither the bankrupt, nor any person claiming through or under him, can recover any of such debts, nor make any release or discharge of them; neither can any of them be attached (as the debt of the bankrupt) according to the custom of the city of London, or otherwise. And the assignees are declared to have the like remedy to recover such debts in their own names, as the bankrupt himself might have had, if he had not been adjudged bankrupt.

All debts vest in the assignees.

A bond given to pay a sum of money to the obligee, in trust for the bankrupt, may be also assigned by the commissioners. (1)

Bond to a trustee.

Where a *heriot*, *relief*, &c. are due to the bankrupt, they also pass by the commissioners' assignment. (2)

Heriot.

So, a *legacy*, given to the bankrupt before he obtains his certificate, passes to the assignees; and, though it is given to him after his certificate has been signed by the creditors and the commissioners, yet if it is before the allowance of the certificate by the Lord Chancellor, it equally belongs to the assignees (3); and this, notwithstanding the allowance is delayed by an unfounded petition to stay it, — unless indeed the petition was presented with that express object (4). Where, however, the bankrupt owed the testator a larger sum of money than the amount of the legacy, the

A legacy before allowance of certificate.

(1) *Gerard v. Aylmer*, Palm. 505.

(3) *Tudway v. Bourne*, 2 Burr.

(2) 3 Com. Dig. Bankrupt, (D. 716.

16.)

(4) *Ex parte Ansell*, 19 Ves. 208.

**Choses in action.**

**Bill deposited with third person.**

assignees, in this case, were held not entitled to any part of the legacy, as against the executors. (1)

A bill of exchange deposited by the bankrupt with a third person, for the *specific purpose* of raising money on it, though such person advances some money on the bill, passes to the assignees; and they are entitled to recover it, after tendering to him the money he had so advanced, — though a general balance remained due to him from the bankrupt. (2)

**Rights of action.**

**Money lost at play.**

All *rights of action* likewise pass to the assignees; therefore, where a bankrupt before his bankruptcy lost his money at hazard, his assignees were held entitled to recover it back (under the 9 Ann. c. 14.) in an action against the winner. (3)

**Money paid on a corrupt agreement.**

So, money paid by the bankrupt, on a corrupt and illegal agreement, may be recovered back by the assignees from the person to whom it is paid. But, where money was paid to a prosecutor, in consideration of putting off the trial of the bankrupt for perjury, for which he was not then prepared, — this was held not recoverable by the assignees; though, if it had been paid by way of compounding the prosecution, it would have been otherwise. (4)

**When right of action does not pass.**

A right of action, however, does not pass to the assignees, *unless they interfere*; for the bankrupt may sue as trustee for them, and has a good title against all persons *but* the assignees. (5) And no right of action passes to them for a mere *personal tort* to the bankrupt; such as *assault*, or *defamation*. But, with respect to a tort to the **PROPERTY** of the bankrupt, which has the effect of deteriorating its value, whereby the assignees are deprived of the benefit which they would have otherwise enjoyed — as in the case of running down a ship, — or cutting timber, whereby a

(1) *Richards v. Richards*, 9 Pri. 219.

(2) *Key v. Flint*, 8 Taunt. 21.; and see "Set Off."

(3) *Brandon v. Pate*, 2 H. B. 308.

(4) *Harvey v. Morgan*, 2 Star. 17.

(5) *Cumming v. Roebuck*, 1 Holt. 472. *Clark v. Calvert*, 3 Moore,

96.



greater injury is sustained than the mere value of the timber fallen, — this is a question which, Sir W. Evans says(1), has never yet been fully considered. Though there seems to be no more reason, why such a right of action should not pass to the assignees, than in those cases where the party has received money, or made a profit, in consequence of his tortious act — when the assignees may waive the *tort*, and bring an action of *assumpsit*.

*Choses in action.*  
\_\_\_\_\_

Where the bankrupt had recovered damages in an action on the case for *words*, and the sheriff had levied the amount under an execution against the defendant; but, instead of paying it over to the bankrupt, brought it into court, and the assignees applied to take the money out of court, — it was held, in one of the old cases, that the assignees were, under these circumstances, not entitled to the money; on the ground, of its being *in custodia legis*, and therefore not assignable — and that as it was levied by record, it could only be delivered to him who was able to acknowledge satisfaction of record, which the assignees (being strangers to the record) could not do; the money was therefore ordered to be delivered to the bankrupt. (2)

But in another case, under similar circumstances, the Court, though they refused to order the money to be paid over to the assignees, consented nevertheless to detain it, in order that the assignees might take out a *scire facias* against the defendant to try the bankruptcy. (3) And this, indeed, appears to be the more regular course of proceeding, whether the sheriff brings the money into court, or retains it in his hands (4); though in one case, where the bankrupt had obtained judgment on a *scire facias*, the Court, upon motion, ordered the judgment to be entered, so as to entitle the assignees to the benefit of it, without bringing a new *sci. fa.* (5) As several subsequent cases,

Where money in hands of sheriff under an execution in *tort*.

Mode of proceeding to recover it.

(1) Evans's B. L. 14. 4 Evans's Stats. 329.

(2) *Benson v. Flower*, Cro. Car. 166. 176. Sir W. Jones, 215.

(3) *Monk v. Morris*, Ventr. 193. 1 Mod. 93.

(4) See post, "Actions," ch. 17. s. 3.

(5) *Plummer v. Lea*, 5 Mod. 88.

*Choses in action.*  
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however, have determined that a party, who is entitled to receive money levied by a sheriff, may bring an action against him for not paying it over, it seems that the assignees might (if the sheriff retained money in his hands which he had levied under the bankrupt's execution) recover it from him in an action for money had and received. (1)

Partnership premium payable by instalment.

A trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, became bankrupt five years after the commencement of the partnership, when only one instalment was due: — the Court held, that his assignees were, nevertheless, entitled at the respective periods to receive the remaining instalments. (2)

Compensation under West India Dock Act.

Where *compensation* was given by the legislature to the proprietors of ancient quays, upon the establishment of the West India Docks, Lord Eldon decided, that this was an interest capable of disposition, and consequently passed to the assignees. (3) The subject matter in this case was a specific vested pecuniary interest, and there could, therefore, be no doubt entertained that it was comprehended within the terms of the Bankrupt acts.

Good-will of a business, if assigned by assignees, not binding upon the bankrupt.

But, with respect to what is called the *good-will* of a business — that is, a compensation given to a trader for declining trade and recommending another as his successor, he himself engaging not to carry on the same business within certain limits, — Sir W. Evans very justly observes, it is impossible to suppose, that the assignees of a bankrupt can compel him to enter into similar stipulations, for a consideration to be paid to themselves. (4) And his reasoning derives great weight from what was said by Lord Eldon in a case, where the assignees of a bankrupt (who was a carrier) had sold to a plaintiff the premises

(1) *Speake v. Richards*, 2 Show.

289. *Dale v. Birch*, 3 Camp. 347.

*Longdill v. Jones*, 1 Star. 345.

(2) *Akhurst v. Jackson*, 1 Swanst.

85. Wils. Ch. Rep. 47.

(3) *Chandler v. Gardiner*, cit.

17 Ves. 338. 343.

(4) *Evans's B. L.* 20.

which the bankrupt had occupied, as well as the carrying business, in these terms: "*and also the good-will of a long established trade, &c.*;" and, the bankrupt having resumed the like business in the same district, the Lord Chancellor refused to grant an injunction to prevent him from so doing, — observing, that the good-will, which was the subject of sale, was nothing more than the *probability* that the old customers would resort to the old place; and that by interposing in this particular instance, he should carry the effect of injunction to a much greater length, than any decision had authorized, or imagination ever suggested. (1)

*Choses in action.*

It has, however, been decided that the right of publishing a particular *newspaper* was a property affected by the Bankrupt law (2); and Lord Mansfield is also reported to have held, that what is called a *news-walk*, that is, the business of selling newspapers to particular customers within a given beat, was likewise a property distributable under a commission of bankrupt. (3) But the authority of this last case (as far as it implies any *obligation* on the bankrupt) is much shaken by the above decision of Lord Eldon in *Crutwell v. Lye*, as well as the forcible reasoning of Sir W. Evans (4), in his comment on the former statutes relating to bankrupts.

Copyright of newspaper assignable.

A *patent* right for the exclusive exercise of an invention, though obtained from the crown by the bankrupt after his bankruptcy, but before he procures his certificate, is affected by the previous assignment of the commissioners, and also vests in the assignees. (5)

A patent right vests in assignees.

So, a *policy of insurance*, effected by the bankrupt upon his own life at an annual premium, passes to his assignees;

So a policy of insurance on the bankrupt's life.

(1) *Crutwell v. Lye*, 17 Ves. 355.

<sup>1</sup> Rose, 123.

(2) *Longman v. Tripp*, 2 N. R.

61.; and see *Hogg v. Kirby*, 8 Ves. 125.; and *Cooke v. Calcraft*, 3 Wils.

580. as to the general interest in such property.

(3) 2 N. R. 70.

(4) Evans's Bankrupt Statutes, page 19. note (10).

(5) *Hesse v. Stevenson*, 3 B. & P. 565.

*Cheese in  
action.*

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and where, instead of delivering it up as part of his effects, a bankrupt secretly assigned it to another person, who paid the arrears of the premium, and upon the death of the bankrupt received the sum insured, — the amount, deducting the arrears so paid, was held to be recoverable by the assignees as money had and received to their use. (1)

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### SECTION III.

#### *Of Leases and Annuities, and herein of Forfeiture upon Alienation.*

A lease  
passes to  
assignees,  
though  
containing  
a general  
proviso  
not to  
assign.

Aliter, if  
proviso to  
re-enter,  
if lessee is  
found a  
bankrupt.

A *Lease* granted to a bankrupt passes to his assignees, although it contain a proviso that the lessee shall not assign without the lessor's consent; for the interest in the lease is considered to vest in the assignees by *operation of law* (2), and not by the *act of the party*, (that is, the voluntary assignment of the lessee) to which last mode of transfer a restriction of this nature is alone confined. (3) But a lease, with a proviso that the landlord might *re-enter*, if the lessee should "commit an act of bankruptcy whereon a commission should issue, and he should be *found a bankrupt*," does not pass to the assignees (4); for this is a *condition* annexed to the demise itself, and renders the *term void*, in case the lessee becomes a bankrupt. The owner of property, indeed, cannot by contract, or otherwise, qualify *his own interest*, by a condition determining or controlling it in the event of his bankruptcy, to the prejudice of his creditors, (as has been already fully considered in the case of marriage settlements); but a lessor, like any other grantor or alienor, may qualify

(1) *Schondler v. Wace*, 1 Camp. 487.

(2) *Goring v. Warner*, 2 Eq. Ca. Ab. 100. 7 Vin. Ab. 85. *Philpot v. Hoare*, Amb. 480. 2 Atk. 219. *Doe v. Bevan*, 3 M. & S. 353. *Doe v. Bugby*, 3 Wils. 234.

(3) *Ex parte Baglehole*, 1 Rose, 432. *Ex parte Sherman*, Buck, 462.

(4) *Roe v. Galliers*, 2 T. R. 153.; and see 15 Ves. 268.

the interest of his lessee, upon a condition to take effect on the bankruptcy of the lessee. (1)

So, where the term is made to depend upon the actual occupation of the premises by the lessee, the assignees have, in this case, not such an interest as they can assign, if the bankrupt does not continue to occupy. (2)

In like manner where an annuity was given by will to a trader "payable to him only, upon his own receipt and no other, and to cease immediately upon alienation,"—it was held, that it ceased upon his bankruptcy, and the bargain and sale of his estate. (3) So, where there was a bequest to pay an annuity to A., with a proviso that if by any ways or means whatsoever he should sell, dispose of, or *incumber* his life-interest, or any part thereof, his interest should then cease, and the trustees should apply and determine the same for the benefit of his children,—it was held, that upon his bankruptcy the annuity ceased to be the subject of his personal enjoyment, and did not, therefore, vest in his assignees; but that his children were entitled to it. (4)

But where a testator directed, that his estate and effects should be laid out in the public funds in the names of trustees, who were to "pay the dividends from time to time into his son's hands, or to his order, and on his receipt, to the intent that the same, or any part thereof, should not be grantable, or assignable, by way of anticipation,"—Lord Eldon held, that on the bankruptcy of the son, his assignees were entitled to his interest under the will. (5) And in another case, where the testator bequeathed several annuities, and (amongst the rest) one to the bankrupt, and declared that "if any of the annuitants should assign, or dispose of, or otherwise charge or *incumber* his annuity, so

*Annuities.*

Or where the term depends upon his actual occupation.

Conflicting decisions in the case of an annuity limited to personal enjoyment.

(1) *Wilson v. Greenwood*, 1 Swanst. 481.; and see per Lord Ellenborough, 3 M. & S. 357.

(2) *Doe v. Clarke*, 8 East, 185.

(3) *Dommett v. Bedford*, 6 T. R. 684. 3 Ves. 149.

(4) *Cooper v. Wyatt*, 5 Mad. 483.

(5) *Brandon v. Robinson*, 1 Rose, 197.

**Annuities.** as not to be entitled to the personal receipt, use, and enjoyment thereof, the annuity should thenceforth cease, determine, and be void, and should immediately devolve upon the person next entitled, by virtue of the limitations in the will,"—Sir W. Grant, upon the principle of the above decisions as to *leases*, in which an assignment *by operation of law* is holden not to be an alienation of the party, considered that the interest had not ceased by the bankruptcy, but that it vested in the assignees. (1) Though, in another case, where the annuitant had taken the benefit of the *insolvent act*, the same learned Judge held, that a condition of this nature was broken by the annuitant, inasmuch as the *signing the petition and schedule* were clearly acts of alienation committed by the insolvent. (2)

**Observations.**

These decisions of *Brandon v. Robinson* and *Wilkinson v. Wilkinson* are, certainly, quite at variance with those of *Dommett v. Bedford* and *Cooper v. Wyatt*. The grounds of Lord Eldon's judgment in *Brandon v. Robinson* are, that there is a great difference between giving an interest to a person while he shall *remain solvent, and then over*,—and giving it *generally for life*; and that it is not enough for a testator to say the fund shall not be transferred, — but that in order to prevent that, it must be given *over to somebody else*, or made to fall into the residue of his property; otherwise, it becomes an equitable interest to which the assignees are entitled. (3) This reasoning, however, will not apply to the case before Sir W. Grant, where the annuity was given over, being made to devolve upon the person next entitled under the will; and the limitation is also strong as to the *personal enjoyment* of the annuity by the annuitant. Whether a grantor, therefore, of an annuity, can effectually limit his grant to the period only of the solvency, or personal enjoyment, of the annuitant, unaccompanied with any

(1) *Wilkinson v. Wilkinson*, G. and see *Holyland v. De Menda*, Coop. 259. 3 Meriv. 184.

(2) *Shee v. Hale*, 13 Ves. 404.; (3) 1 Rose, 197.

limitation over in case of insolvency, &c., so as to prevent *Leases.* it from passing to the assignees under a commission of bankrupt,—is a question, which may still admit of very considerable doubt.

The general assignment of a bankrupt's estate does not vest a lease or term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term, and their acceptance of the lease. (1) For they are not bound (as has been before observed (2)) to take *all* the property of the bankrupt, but may reject such as may be rather a burthen than a benefit to the estate. Before the case of *Copeland v. Stephens*, however, it was a point still undecided, whether the bankrupt's interest in a lease *passed immediately* to the assignees, *de-feasible* upon their actual refusal to take it,—or, whether the interest in it was *suspended* until their acceptance or rejection of it. In an able judgment pronounced by Lord Ellenborough in that case, it was determined, that the effect of the assignment was *suspended*, until the assignees decided either to accept, or reject, the lease; and that the estate *remained in the bankrupt during the period of suspension*,—but subject to the right of the assignees to have the term, by their subsequent acceptance of it,—and thereby to vest it in themselves. (3)

What acts on the part of the assignees will amount to an acceptance of the lease, and what to a rejection, will be best explained by the following cases. *Cases of acceptance, and rejection.*

A landlord applied to the assignee to know, if he meant to take the bankrupt's interest in the lease, and he answered, that if he did not let it by Lady-day, he would give it up; and at Lady-day the assignee paid the rent then due, and offered the landlord the key:—under these circumstances, Lord Kenyon held, that though the assignee might have refused it at first, yet he could not take it in part, and afterwards reject it, when he found that it would not *What amounts to acceptance.*

(1) *Copeland v. Stephens*, 1 B. & A. 593.

(2) Ante, 320.

(3) 1 B. & A. 593.

Leases.

answer and he could not let the premises. (1) So, where the assignees, who were chosen on the 8th July, allowed the bankrupt's cows to remain on the demised lands till the 10th, and ordered them to be milked there, — Lord Ellenborough decided, that they thereby became tenants to the lessor; and, the cows being removed on the 10th to avoid a distress for arrears of rent, it was held, that the landlord had a right to follow and distrain them under the 11 G. 2. c. 19. (2) So, if assignees intermeddle with, and assume the management of a farm, this is a sufficient election to take to the term (3), and renders them liable to the landlord. So, also, where assignees entered upon, and *took actual possession* of the leasehold property, they were held to become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold; for, if they had wished to curtail the full legal effect of taking possession of the premises, they should have entered with a protest, that their entry was not for the purpose of possessing themselves of the premises as assignees, but merely to take possession of the goods. (4) And, when the assignees permitted the bankrupt to continue in possession of the premises, from the period of his bankruptcy in *November* until *April*, and to carry on the trade for the benefit of the estate, the assignees inspecting the books, and furnishing the bankrupt with money, — it was held, that they could not afterwards disclaim to accept the lease, notwithstanding a notice to that effect had been given by them within a month after the bankruptcy. (5) So, where the bankrupt having a lease of premises, and also a reversionary interest in them, the assignees sold “*all his estate and reversionary interest in the premises,*” — this was held to

(1) *Broome v. Robinson*, cit. 7 East, 339.

(2) *Welch v. Myers*, 4 Camp. 368.

(3) *Thomas v. Pemberton*, 7 Taunt. 201.

(4) *Hanson v. Stevenson*, 1 B. & A. 303.

(5) *Clark v. Hume*, 1 Ryan & M. 207.



amount to an acceptance of the lease.(1) And so, where the assignees placed a board upon some part of the premises, with a view to dispose of them, they were holden liable in use and occupation for a year's rent.(2) Where assignees, also, upon being required to give up possession of premises, answered that it was not consistent with their duty so to do,—this was held sufficient proof of possession by them, in an action of ejectment brought against them for the recovery of the premises.

Leases.

But though the assignees, by accepting a lease, discharge the bankrupt from any claims for rent, and render themselves liable to the landlord, yet they may assign it, if they choose, to any person (even though an insolvent) in order to get rid of their liability.(3)

Assignees get rid of their liability by assigning.

And the assignees are not bound to take a lease, merely because they endeavour to sell it, with a view to ascertain its value,—provided they exercise no other acts of ownership over the premises demised. Thus, where assignees advertised a lease for sale by auction (without stating themselves to be the owners, or possessed of it), and never, in fact, took possession of the premises, and no bidder offered at the auction,—it was held, that this was no more than an experiment to ascertain the value, and whether the lease was beneficial or not to the creditors,—and did not amount to an assent to take it.(4) If, indeed, a bidder had been found, and the assignees had accepted the bidding, and received a deposit, then that would have been evidence of their assent to take to the premises, notwithstanding the contract of sale might have afterwards gone off.(5) So, where assignees allowed the bankrupt's effects to remain on the premises for nearly a twelvemonth after the bankruptcy, and then, to avoid a distress, paid the rent due, at the same time intimating to the landlord that

What acts do not amount to an acceptance.

(1) *Page v. Godden*, 2 Star. 509.

(4) *Turner v. Richardson*, 7 East,

(2) *Gibson v. Courthope*, 1 D. &

355.

R. 205.

(5) *Hastings v. Wilson*, 1 Holt,

(3) *Onslow v. Corrie*, 2 Mad. 330. N. P. Rep. 290.

**Leases.**

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they did not mean to take to the lease, unless it could be advantageously disposed of—and the lease was soon afterwards put up to sale by order of the assignees, but there was no bidder for it, and they even omitted to return the key to the landlord for near four months afterwards, but never took actual possession of the premises,—Lord Ellenborough held, that the assignees were not, under these circumstances, liable to the landlord as assignees of the lease. (1) And so, where the bankrupt had underlet part of the demised premises, and the assignees released the under-tenant, and on being afterwards asked by the lessor to elect, they refused to take the lease,—it was held, that the release to the under-tenant did not amount to an acceptance. (2)

**Assignees  
may be  
compelled  
to elect.**

But now, in order to prevent any inconvenience to the landlord, from the neglect of the assignees to determine whether they will take to the lease or not, it is by the 75th section of the new act provided, that if the assignees shall not (upon being thereto required) elect, whether they will accept or decline any lease, or agreement for a lease, to which the bankrupt was entitled, the lessor, or person so agreeing to grant a lease, or any person entitled under them, may apply by petition to the Lord Chancellor; who may order them so to elect, and to deliver up such lease, or agreement, (in case they shall decline it,) as well as the possession of the premises,—or may make such other order therein as he shall think fit. (3)

**Extent of  
the Chan-  
cellor's ju-  
risdiction  
in this  
respect.**

The above clause, it has been held, applies only to cases between the *lessor* and lessee, or the assignee of the lessee; and not to cases between the *lessee* and the assignee of the lease. (4) The Lord Chancellor is not empowered under this section to determine the question, whether the assignees *have elected* to take the lease or not,—but can only send such

(1) *Wheeler v. Bramah*, 3 Camp. 340.

(2) *Hill v. Dobie*, 2 Moore, 342. 8 Taunt. 325.

(3) This clause is taken from the 49 G. 3. c. 121. s. 19.

(4) *Taylor v. Young*, 5 B. & A. 521.

a question to be tried by a jury (1); for he has only authority, under the above provision, to make an order that the assignees *shall elect*. It is only, in fact, when assignees will *not decide*, that jurisdiction is given to the Lord Chancellor; for if they have already accepted, or rejected, he has no jurisdiction. (2) Therefore, where assignees had *previously rejected* a lease, a petition by the lessor for payment of rent due after the bankruptcy, and for a compensation for hay and straw which the assignees had carried off the premises, was dismissed (3); Lord Eldon concurring with the Vice-Chancellor, that, as between the lessor and the assignees of a bankrupt lessee, the Court had not jurisdiction — except in cases *under the statute* — and upon petitions for an *injunction*; for which the petition in this case contained no prayer.

*Leases.*  
—

Upon a petition for an order on the assignees to elect, they will be allowed a reasonable time—such as ten days, for instance—to consider what will be most beneficial for the creditors. (4) And in a case where there were two commissions, and issues directed which were still undecided, — the Court granted an order (under each commission) on the assignees, to make an election to depend on the result. (5)

Assignees allowed a reasonable time to elect.

Where the assignees declined taking the lease, but insisted that they were entitled to remove from the premises all the hay, straw, &c. (which, by a covenant in the lease, the lessee at the end, or sooner determination of the term, was to *leave* upon the premises), — Lord Eldon determined the lease, and directed a case upon the construction of the covenant. (6) Upon the argument of this case before the Court of King's Bench, it was decided, that the assignees

Bound by the covenant of the lessee, as to leaving hay, straw, &c.

(1) Ex parte *Quantock*, Buck, 189.

(2) Mad. 77.

(3) Ex parte *Warwick*, Buck, 326.

(4) Ex parte *Scott*, 1 Rose, 446. note (a).

(5) Ex parte *Pomeroy*, 1 Rose, 57.

(6) Ex parte *Niron*, 1 Rose, 445.

This case at first sight appears to clash with the decision in ex parte *Warwick*, *suprà*; but the distinction between them is, that in this case there was a prayer for an *injunction*; in that case there was no such prayer.

**Leases.**

When entitled to off-going crops.

were bound by the covenant of the lessee, and were not entitled to the hay, straw, &c. (1) In all these cases, indeed, where the Lord Chancellor determines the lease upon the petition of the lessor, the assignees are in the same situation, as the tenant would have been in by effluxion of time. Therefore, where a lease contained a covenant, that the lessee "at the expiration, or *other sooner determination* of the lease," might *take* the off-going crop — and the lease was determined by the Chancellor after the bankruptcy of the lessee, — the assignees were held to be entitled (2) to the off-going crops. Nor does it make any difference, that the lease is only from year to year, *determinable on giving half a year's notice*, and the covenant is to leave the hay, &c., or take the crops, on quitting the premises (3); for the election of the assignees, not to take the lease, has the same effect (with reference to the covenant), as though the lessee had quitted upon notice.

*Parol* agreement for a lease, not within the statute.

A *parol* agreement for a lease, (although brought within the principle, upon which a court of equity would decree a specific performance, upon acts of part performance) it has been held, is not an agreement within the meaning of the statute, — so as to put assignees to elect, or reject, such agreement. (4)

Where the lease in the hands of a third person.

Where the lease had been deposited by the bankrupt with a THIRD PERSON, as a security for a debt, and the assignees refused to take to the term, — upon a petition by the landlord that the assignees might deliver it up, as well as the possession of the premises, an order to that effect was made. For though the statute does not in words extend to cases, where the lease is in the hands of a *third person*, yet it seems that, by an equitable construction of the above section of the act, which is intended for the benefit of landlords, the Chancellor has such a jurisdiction. (5)

(1) In re *Gough*, Buck, 85.

(2) Ex parte *Maundrell*, Buck, 148.  
83.

(3) Ex parte *Whittington*, Buck,  
87.

(4) Ex parte *Sutton*, 2 Rose,

(5) Ex parte *Clunes*, 1 Mad. 76.

## SECTION IV.

*Of Property Abroad.*

As the statute enables the commissioners to assign the bankrupt's property, *wheresoever the same may be found or known* (1), the assignees are entitled to all the personal property, which the bankrupt may possess in any *foreign country*, unless there happens to be some positive law of that country to prevent it. For *personal property*, according to the general principles of all laws, has no visible locality, but is subject to that particular law, which governs the *person* of the owner. (2) If the Bankrupt law, indeed, was circumscribed by the local situation of the property, a door would be open to all the partiality of undue preference, which it is framed chiefly to prevent; for it is not very difficult to foresee, how frequently property would be sent abroad with that unjust view, immediately previous to and in contemplation of an act of bankruptcy. But the consequence of the rule, as it at present applies to personal property, is, that a commission of bankruptcy followed by an assignment, defeats all preference attempted to be obtained by any one creditor, through the medium of the law of the country where any of the bankrupt's effects may happen to be placed — (as well as by any voluntary conveyance of the bankrupt) — after the period, when the legal effect of the bankruptcy attaches to the general estate.

Personal  
property  
abroad  
passes to  
assignees.

Thus, the bankrupt's goods in Ireland will pass to the assignees by the assignment from the commissioners, and the Irish courts will also take notice of our laws, so as to prevent a creditor from attaching property there after the commission, and gaining a preference (3) over the assignees. So, the courts in Scotland, and the colonies,

Property  
in Ireland.

Scotland.

(1) Section 63. ante, page 383.

(2) *Sill v. Worswick*, 1 H. B. 665.

(3) Good, 114. *Neale v. Cottingham*, 1 H. B. 132. in note.

**Property  
abroad.**

recognize the English law in this respect. For, where bankrupts here had carried on business both in London and in Scotland, under distinct firms, the Court of Session in Scotland held, that the commission here vested in the assignees all the property of the bankrupts wherever situate, — precluding creditors in Scotland, from attaching by sequestration such parts of the bankrupts' property, as remained, or was situate, in that country. (1) Whether a commission in England, or a sequestration in Scotland, is to be preferred, as the mode of administering the effects of a bankrupt, depends upon their respective priorities. (2)

**Where a  
creditor  
attaching  
money  
abroad,  
liable to  
refund to  
assignees.**

Where, AFTER THE ASSIGNMENT of a bankrupt's estate, a creditor residing in England, who had notice of the bankruptcy and assignment, attached the money of the bankrupt abroad, — it was held, that his assignees might recover it against the creditor in an action for money had and received. (3) And in another case, where the attachment was *before* the assignment, the same doctrine was held. (4) In one case indeed of this kind, Lord Hardwicke even granted a writ of *ne exeat regno* against a creditor, who before the bankruptcy had gone into Scotland, and made arrestments on debts due to the bankrupt there, though he had not obtained sentence — saying, that the case was like a foreign attachment, by which a creditor was not suffered to gain a priority. (5)

**When not  
so liable.**

But in a case, where the bankrupt was one of several partners — his partners carrying on a branch of the business in the West Indies — and a joint creditor there attached property belonging to the firm abroad, — it was

(1) *Bank of Scotland v. Cuthbert*, 1 Rose, 462.; and see *Selkrig v. Davis*, 2 Dow. Rep. 230. 2 Rose, 291. and *Odwin v. Forbes*, Buck, 57.

(2) *Ibid.*

(3) *Hunter v. Potts*, 4 T. R. 182. *Philips v. Hunter*, 2 H. B. 402. The law upon this subject, however, appears to have been formerly laid

down differently by Lord Mansfield, both at *Nisi Prius*, and at the Cockpit. (*Waring v. Knight*, 1 C. B. L. 300. *Cleve v. Mills*, *ibid.* 297.) See also a powerful judgment of Eyre C. J. on that side the question, in *Philips v. Hunter*, 2 H. B. 409.

(4) *Sill v. Worcester*, 1 H. B. 665.

(5) *M'Intosh v. Ogilvie*, 4 T. R. 187. note (a).

held by Sir W. Grant, that he was entitled to retain what he had recovered, to the extent of satisfying his joint debt. (1) And where the attachment of property in a foreign country is *complete before the act of bankruptcy*, the creditor is then, of course, entitled to hold the property attached against the assignees, in satisfaction or reduction of his debt. (2) Whenever, also, property has been duly recovered by a creditor from the bankrupt's debtor, by process of local law, the assignees are not entitled to claim the value of it again, as against such debtor. (3)

*Property  
abroad.*

A., a merchant at Paris, purchased in his own name, but with the money and on the account of B. (a merchant at Bristol) certain bank shares in the French funds; and B. afterwards drew bills on A., which A. accepted, on the security of those shares standing in his name; three of which bills were purchased by C. (a British subject) for a valuable consideration paid to B. Before the bills became due, B. authorised A. by letter to sell the bank shares, in order to reimburse himself against these bills; but previous to the arrival of that letter, A. had stopped payment, — and the bills were dishonoured. B., also, afterwards became bankrupt; and C. then, by process according to the French law, attached the bank shares (still standing in the name of A.) for the debt due to him as the holder of the bills; and the French court decreed, that the bank shares should be sold, and that the proceeds should be applied, first to pay a debt due from B. to A., and afterwards to retire the bills; — and C., under this decree, received a certain sum of money on account of the bills. Under these circumstances it was held, that the assignees of B. could not recover back this money, as money belonging to B.; for that A. had more than a simple lien on the bank shares,

(1) *Brickwood v. Miller*, 3 Meriv. 279. Sir W. Grant expressed a doubt in this case, whether the reasoning of Lord C. J. Eyre, in *Phillips v. Hunter*, has ever re-

ceived a completely satisfactory answer.

(2) *Ex parte D'Obree. Ex parte Le Mesurier*, 8 Ves. 82.

(3) *Le Chevalier v. Lynch*, Doug. 170.

*Property  
abroad.*

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Courts  
here will  
favour the  
claims of  
foreign  
assignees.

they being in law *his property*, and vested in him—though in trust for B., after satisfying his own lien. (1)

Upon the same principle, as the courts here refuse to acknowledge the validity of an attachment made by a creditor on the bankrupt's property abroad, which may give him an undue preference over the other creditors,—so the English courts will equally give effect to the claim of Foreign assignees, (when the laws of the Foreign country are proved) in the recovery of personal property here;—and will prevent a creditor from obtaining an exclusive satisfaction out of such property, to the prejudice of the Foreign assignees. (2)

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### SECTION V.

#### *Of Property in the Possession, Order, or Disposition of the Bankrupt, as reputed Owner.*

1. *What things are within the Statute.*
2. *What Possession is within the Statute.*
3. *Possession as Factor, Banker, or Broker.*
4. *Possession as Trustee, Executor, or Administrator.*

By section 72. of the new statute, it is enacted (3), that if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission. But any transfer or assignment of any

(1) *Cazenove v. Prevost*, 5 B. & A. 70.

(a). *Jollet v. Deponthieu*, *ibid.* 132. note.

(2) *Sill v. Worswick*, 1 H. B. 691.  
*Solomons v. Ross*, *ibid.* 131. note

(3) This section is taken from the 21 Jac. 1. c. 19. s. 10, 11.



ship or vessel, or any share thereof, made as a security for any debt, either by way of mortgage (1) or assignment, duly registered according to the provisions of the new register act, (4 Geo. 4. c. 41. s. 44.) is not to be invalidated, or affected, by this enactment.

*Reputed  
ownership.*  
———

*And, 1st, as to what things are within the Statute.*

The object of the above enactment is to remedy the mischief arising from a trader holding out a delusive responsibility to the world, by appearing to be possessed of a stock in trade, or of other valuable articles, which are the subjects of sale and immediate transfer. The goods and chattels, therefore, comprehended within the meaning of the statute, must be taken to mean *personal* chattels, and not to comprise chattels real. For the *possession*, and *power of disposing*, of goods and personal chattels, are the only evidences of ownership, to which persons dealing with traders generally look; but with respect to *real* property, the fact of *mere possession* is not such evidence of ownership, as to induce a creditor to *rely* on it; — it being a matter of notoriety, that real estates are frequently mortgaged, and that the mortgagor usually remains in possession of the property. (2) No creditor, therefore, can with reason say, that he has been deceived by the bankrupt's possession of property of that description.

*Only per-  
sonal chat-  
tels.*

For this reason, *fixtures*, and things affixed to the freehold, that are mortgaged with the premises to which they belong (3); or even *shares* in a public company, whose funds arise from the rents, or tolls, issuing out of *real* estate (4), are not within the above enactment. But *move-*

*Not fix-  
tures, &c.*

(1) A mortgagee of a ship was not formerly so protected. *Stephens v. Solc*, 1 Ves. 352. *Hay v. Fairbairn*, 2 B. & A. 193. *Monkhouse v. Hay*, 2 B. & B. 114. 4 Moore, 57. 8 Price, 256. *Kirkley v. Hodgson*, 1 B. & C. 588.

(2) *Ryal v. Rolle*, 1 Atk. 168. 1 Ves. 348.

(3) 1 Atk. 176. *Horn v. Baker*, 9 East, 215.

(4) Ex parte *Vauxhall Bridge Company*, 1 G. & J. 181.

*Reputed  
ownership.*

*Aliter,*  
moveable  
utensils,  
unless let  
by usage.

*able utensils* not fixed to the freehold, such as a *brewer's or distiller's vats* (1), or a *dyer's plant* (2), will be affected by it; unless, indeed, they are utensils of a *particular trade*, in which there is a *well-known usage* for the trader to have those utensils let to him on hire — the possession of them in that case not imposing on the world a false appearance of property in the possessor (3) — as in the manufacturing counties, where it is a common practice for the working hosiers, spinners, and weavers to have on hire the possession of *stocking-frames*, and other valuable machines, which they are unable to purchase. And the same exception, perhaps, will be found to apply to the case of *job horses*, and *carriages*, which it is a well-known practice to have on hire. (4) So, where a COLLIERY was demised to the bankrupt, with certain engines, machinery, and implements, which were to be rendered up to the lessor at the expiration, or other sooner determination, of the lease — and, the tenant failing in the payment of the rent, the lease became forfeited, and the landlord recovered a judgment in ejectment, but did not execute the writ of possession until the day before the tenant became bankrupt, — it was held, that the tenant never had under this demise the possession, order, or disposition of the engines and machinery within the meaning of the 21 Jac. 1. c. 19. s. 10. (from which statute the above section is taken), but a mere qualified right to use them during the term; and that, even if they had been in his possession within the meaning of the statute, they would have ceased to be so, when the landlord resumed possession by executing the writ of inquiry. Neither was the tenant considered to have such order and disposition of them, though he continued to work the colliery, and have the use of them during the intermediate

(1) 9 East, 215.

(2) *Bryson v. Wylie*, 1 B. & P. 83. note (a). 1 C. B. L. 234. Ex parte *Dale*, Buck, 365. *Lingard v. Messiter*, 1 B. & C. 508.

(3) Per Le Blanc J. 9 East, 244.; and see *Storer v. Hunter*, 5 B. & C. 368.

(4) Per Lawrence J. 5 Taunt. 490.

time, between the recovery of the judgment in ejectment, and the execution of the writ of possession — a period of fifteen months. (1) *Reputed ownership.*

All *choses in action* (2) are within the enactment; as shares in a public company (8), bills of exchange (4), and policies of insurance (5), — as well as a share in a newspaper (6), stock in the public funds (7), and a patent for an invention. (8) *Choses in action.*

## 2. What Possession is within the Statute.

As to what *possession* will constitute a case of reputed ownership, within the meaning of the above enactment, that is a question more of *fact*, than of *law*, — and, as such, peculiarly within the province of a jury to determine. (9) The *possession* of property is, of course, *prima facie* evidence of reputed ownership; and more or less strong, according to the circumstances under which that possession was acquired, or is retained. The possession, however, must be acquired *before the act of bankruptcy*, in order to constitute a possession within the meaning of the statute. *Possession prima facie evidence.*

When a bankrupt has *once* been the ostensible *owner* of property, and he *continues* in the *visible possession* of it at the time of his bankruptcy, — that is a very strong case of reputed ownership; and can only be rebutted by clear proof, not only that there has been a transfer of the property from the bankrupt, but that such transfer was notorious to the world; for when a man has been at one time *Still stronger, when bankrupt had once been the owner.*

(1) *Storer v. Hunter*, 3 B. & C. 368.

(2) *Ryall v. Rolle*, supra, per Lord K. 7 T. R. 235.

(3) *Nelson v. London Assurance Company*, 2 Sim. & S. 292.

(4) *Hornblower v. Proud*, 2 B. & A. 327.

(5) *Falkner v. Case*, cit. 2 T. R. 491. *Ex parte Smith*, Buck, 149. 3 Mad. 63.

(6) *Longman v. Tripp*, 2 N. R. 67.

(7) *Ex parte Richardson*, Buck, 180.

(8) *Ex parte Granger*, Evans's Statutes, title "Bankrupt," 64.; and see ante, 389.

(9) Doug. 317. 1 B. & P. 89. 9 East, 241.

Reputed ownership.

But must be accompanied with some evidence of reputation.

Reputation may be rebutted by other evidence.

A secret transfer, void against creditors.

the real owner of property, the presumption is that he continues so, where there is no change of possession. (1) But *mere continuance in possession* by an assignor (under pecuniary embarrassments) of property assigned, though always suspicious, is not of itself a *conclusive* badge of fraud. (2) So, the fact of *possession*, without any evidence of *reputation* of ownership, may not be sufficient of itself to bring the case within the statute; or, at least, not without showing *how*, or *when*, the bankrupt became possessed. And in all these cases, where facts are proved, which amount to a disposition of the property by the bankrupt as owner, *general evidence* may be given of his being *reputed* to be the owner. (3) But the inference of ownership, from possession, and even from reputation of ownership, may be rebutted by evidence contradicting that reputation. (4)

Independently, however, of any consideration of *bankruptcy*, it is a general rule of law, that all *secret* sales and transfers of personal chattels, unaccompanied by possession, are fraudulent and void as against creditors; since the effect of them is, to enable a party to gain a false credit from the world. Therefore, where a creditor took an *absolute* bill of sale of his debtor's goods, but agreed to leave them in his possession for a limited time, the bill of sale was held void against creditors. (5) And so, in the case of an assignment to trustees, where possession did not accompany and follow the deed. (6) But where an agreement, for the transfer of household furniture and farming stock, was NOTORIOUS in the neighbourhood — though possession in this case was retained by the bankrupt for a certain period, pursuant to the stipulations of the agree-

(1) Per Holroyd J. 1 B. & C. 314.

(2) *Hoffman v. Pitt*, 5 Esp. 25. *Eastwood v. Brown*, 1 Ry. & M. 312.; sed vide per Buller J. *Edwards v. Harben*, 2 T. R. 697.

(3) *Oliver v. Bartlett*, 1 B. & B. 269.; and see *Muller v. Moss*, 1 M. & S. 535.

(4) *Gurr v. Rutton*, 1 Holt, 527. Per Gibbs C. J.

(5) *Edwards v. Harben*, 2 T. R. 587. *Wordall v. Smith*, 1 Camp. 333.

(6) *Bamford v. Baron*, 2 T. R. 594.; and see *Worsley v. De Matos*, 1 Burr. 467.

ment,—such a possession was held not to be within the statute. (1) So where a person (though in embarrassed circumstances) sold and assigned to a creditor all his interest in a leasehold house in which he resided, together with the whole of the furniture and household effects—continuing in the occupation of the house and furniture precisely in the same manner as before; but it did not appear, that the creditor had given less than the *full value* of the property; and the assignor had, in fact, *with the purchase money, paid the debts of several of his other creditors*,—this was held to be a valid transaction (in the absence of any fraud) against an execution creditor. (2) And Lord Chief Justice Abbott said, that he had no doubt that the purchase of a house and furniture, with an immediate demise of them to the vendor, may be good, if there be no intention to defeat or delay creditors by the transaction. (3)

*What possession.*

Where an execution is levied on a trader's goods, but is *concealed* for a length of time, and the trader remains in possession of the goods, and carries on business as usual,—this is a case of reputed ownership within the statute. (4) And the same, where the *warrant was directed to the trader's servant* and another person, as special bailiffs, and they took possession of the goods in the shop, but the business was carried on as usual, though without the trader's interference;—for the possession of the servant in this case

*Secret execution within the statute.*

(1) *Muller v. Moss*, 1 M. & S. 335.

(2) *Eastwood v. Brown*, 1 Ry. & M. 312.

(3) *Ibid.* 313. Lord Ellenborough in his judgment in *Muller v. Moss*, supra, appears to make a distinction in favour of an assignment of furniture (where the assignor continued in possession), that the right to do so formed a *part of the contract*;—and the Vice-Chancellor, also, was inclined to draw a similar distinction, where the delay of possession was consistent with the deed. (*Hartley v.*

*Smith*, Buck, 380.) But this was a part of the contract in *Edwards v. Harben*, where the bill of sale was held void. The better distinction seems to be the one taken by Lord Coke; who recommends, that a gift in *satisfaction of a debt*, by a person who is *indebted to others* also, should be made *publicly*, and not in private; for *secrecy*, he says, is a mark of fraud. *Twyne's case*, 3 Co. 80.; and see *Kidd v. Rawlinson*, 2 Bos. & P. 59.

(4) *Toussaint v. Hartopp*, 1 Holt, 535.

***Reputed ownership.***

Though goods sold and let at a rental.

was considered to be the possession of the master. (1) Nor does it make any difference that, after the utensils or goods are sold under such an execution, they remain in the trader's possession at a *yearly rental* for the use of them. (2) Thus, where a creditor took the furniture of a coffee-house keeper in execution, which, without ever being removed, he afterwards let to him at a yearly rent;—such a possession was held to be within the statute. (3) And though, in one case of this kind, the creditor's initials were actually marked on all the goods, it was held, that this was not sufficient evidence of the *notoriety of the change* of property (4), so as to defeat the claim of the assignees. But, where the execution is *notorious in the neighbourhood*, and the goods are *bonâ fide* sold,—then it has been held (notwithstanding the continuance of possession by the debtor) that they are protected from subsequent executions (5)—and also (as it should seem to follow) from any claim of the assignees of the debtor, if he becomes bankrupt; for there can be no *reputed ownership* of property in a person possessing it, which is *known* to have been seized in his possession by the process of the law.

So any utensils let to the vendor at a rent.

Where, however, after a notorious sale of a dyeing plant and other fixtures to a trader, there was a *private re-sale* of them to the vendor, and then a lease from the vendor to the trader, and *he* appeared to the world as the absolute owner,—this, Lord Mansfield said, was an experiment to defeat the Bankrupt laws, and ought not to prevail against (6) the assignees. So also, where a retiring partner leased to the others who continued the business, certain stills, vats, and utensils proper for carrying it on, and which had been *used by the former partnership*,—it was held, that (the continuing partners having become bankrupt) all such utensils,

(1) *Jackson v. Irvin*, 2 Camp. 48.

(2) 1 B. & P. 82.

(3) *Lingham v. Biggs*, *ibid.*

(4) *Lingard v. Messiter*, 1 B. & C. 308.

(5) *Latimer v. Batson*, 4 B. & C.

652. *Leonard v. Baker*, 1 M. & S. 251. *Watkins v. Birch*, 4 Taunt.

823. *Joseph v. Ingram*, 8 Taunt. 838.

(6) *Bryson v. Wylie*, 1 B. & P.

85. note (a). 1 C. B. L. 353.

as were not fixed to the freehold, passed to the assignees,— as being in the possession, order, and disposition of the bankrupts, as reputed owners. (1)

*What possession.*

It will be observed in this class of cases, that the bankrupt *had once been the absolute owner, or part-owner, of the property, which was afterwards leased to him; and that the principle on which they were decided was, that the change of property was not sufficiently notorious, so as to prevent the world from being deceived by the continuance of possession.* But it has also been held, where the bankrupt was *not the previous owner* of the property, — that a *colourable lease* to him of property, of which he has the *exclusive possession*, and over which he exercises *complete control*, will not take the case out of the statute. Thus where a trader, on leaving off trade, sold the concern to the bankrupt, with the stock, utensils, &c. under a deed, which (though in appearance a lease) was in effect a contrivance to secure the seller of the property interest, at 10 per cent., on the amount of the price until it should be paid; — it was held, that this property (independently of the consideration as to the usurious interest) passed to the assignees, as property, of which the bankrupt was the reputed owner. (2)

Or goods let to any one, though not the previous owner, under a colourable lease.

Where utensils of trade, being the separate property of one of two partners, and insured in his name, were consumed by a fire, and afterwards a joint commission issued against both the partners, and the insurance money was paid to the joint assignees, — it was held, that the separate estate was entitled to it, and not the joint estate—there being no *visible* property at the time of the bankruptcy; for after the fire the subject was in reality gone. (3)

As to produce of fire insurance on separate property in joint occupation.

Where goods, being the commodity in which a trader deals, are purchased of him, and left in his keeping by the purchaser, undistinguished from the rest of his stock, — they will be considered to be in his possession, order, and dis-

As to goods purchased, and left in the possession of the bankrupt.

(1) *Horn v. Baker*, 9 East, 215.

(3) *Ex parte Smith*, Buck, 149.

(2) *Sinclair v. Stevenson*, 2 Bing.

514. 1 Carring. 582.

Reputed  
ownership.

position, within the meaning of the statute; notwithstanding there is even a custom of the trade in the particular species of goods (which in this instance was that of hops) for the purchaser to leave the goods in the merchant's warehouse, subject to a rent for warehouse room; for such a custom does not enable *other* persons, out of that trade, to know that the goods so left are not the property of the (1) possessor. So where A. sold to B. several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper; and it was agreed between the parties, that the brandies should remain where they were, until B. could conveniently remove them; B. then immediately marked the several casks with his initials, and it was notorious to the persons carrying on the wine trade at the place where the parties lived, that the sale had taken place; but no notice of the sale was given to the warehouse-keeper, with whom some of the casks were deposited: — under these circumstances it was held, upon A.'s bankruptcy, that the whole passed to his assignees, as being in his order and disposition; for that it was not sufficient, that the change of property was known only to persons in the *same trade*, — but the transfer ought to have been known to *all other persons*, who might, in consequence of the bankrupt's continued possession of the brandies, have been induced to give him credit. (2)

Goods  
purchased,  
and left.

These cases, however, are somewhat at variance with two others in the Court of Chancery; one of which was decided by Lord Hardwicke, and the other by the present Vice-Chancellor. In the first of these, the facts were, that two-thirds of a quantity of tar (then lying on the quay at Liverpool) were purchased of the bankrupt, and the whole was, pursuant to agreement, put into the bankrupt's warehouse, until the purchaser should give orders for shipping

(1) *Thackthwaite v. Cock*, 3 Taunt. 487. A. 134.; and see *Mucklow v. Mengles*, 3 Taunt. 318. post.

(2) *Knowles v. Horsfall*, 5 B. &



the same off as opportunity offered, and the purchaser also duly paid for the tar ; — upon which Lord Hardwicke held, that as the possession of the tar was merely a *temporary custody*, it could not with any propriety be said to be in the order, disposition, or power of the bankrupt. (1) This case was cited in argument in the above case of *Knowles v. Horsfall*, and was attempted to be distinguished from that, on the ground, that in this the goods were to be left in the possession of the bankrupt only until they could be conveniently shipped ; but in that case, also, the brandies were only to remain with the vendor, until the vendee could conveniently remove them. There does not, in truth, seem any material difference between the two cases, — except, indeed, that the circumstances in *Knowles v. Horsfall* were, upon the whole, more in favour of the purchaser ; for in that case the casks were *marked* with the purchaser's initials. In the other case alluded to, which was before the Vice-Chancellor, a pipe of wine had been purchased of the bankrupt, and, after being bottled off, was set apart in a particular bin in the bankrupt's cellars, distinct from the rest of his stock, each bottle being marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser ; and in this case Sir John Leach thought, that the wine was not in the possession of the bankrupt under such circumstances, as would *deceive his creditors*, by any appearance of its forming part of that stock, to which they might give credit. (2) And this, after all, appears to be the true criterion for determining every case of *reputed ownership* ; for, if the goods are so distinguished by the mark of the true owner, or so separated from the rest of the bankrupt's stock, as to render it impossible for any person dealing with him to be deceived by any appearance of property in the bankrupt ; then, it is apprehended, upon no principle whatever can the goods be said to be in

*What possession.*

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Criterion for determining cases of this nature.

(1) Ex parte *Flyn*, 1 Atk. 185.

(2) Ex parte *Martable*, 1 G. & J. 402.

*Reputed ownership.*

Goods at a wharf in bankrupt's name.

*Contrà, if transferred into the name of the purchaser.*

the possession of the bankrupt, as *reputed owner*, at the time of his bankruptcy.

But all goods lying at a *wharf in the bankrupt's name*, and for which he is liable for rent to the wharfinger, or over which he exercises any control on any part of the day of the bankruptcy, are held to belong to him as reputed owner; though it may be different, if the goods are lying there in the name of his *agent*, and the bankrupt himself has no reputation of ownership attaching to them. (1)

But if the goods are transferred into a purchaser's name in the wharfinger's books, at any time before the act of bankruptcy, then the reputation of ownership in the bankrupt is rebutted. Thus, where the purchaser of goods, then lying at a wharf in the name of the vendor, received from him an order on the wharfinger for their delivery; though the order was not, in fact, carried to the wharfinger for several months afterwards (during which period the vendor had actually disposed of a part of the goods), and the vendor became bankrupt only nine days after the wharfinger had transferred the remainder of the goods into the name of the purchaser, — yet, as the transfer was made in the wharfinger's books previous to the bankruptcy, it was held, that a complete change of the property had taken place; and that the assignees were not entitled to the remainder (2) of the goods. So, where a creditor, who had blank delivery notes on a wharfinger deposited with him by the bankrupt to cover advances, filled up the blanks with his own name, and took possession of the goods only the *very day before* the act of bankruptcy, he was held entitled to the goods against the assignees. (3)

Or if order for the delivery

And, after a written order by the vendor for the delivery of the goods is merely *communicated to the wharfinger, and assented to by him* — though no actual transfer be made

(1) *Arbouin v. Williams*, 1 Ry. & M. 72.; and see *Taylor v. Robinson*, 8 Taunt. 648. 2 Moore, 750.

(2) *Jones v. Dwyer*, 15 East, 21.

(3) *Arbouin v. Williams*, *suprà*.

in his books—the property has been held to pass to the (1) vendee. Therefore, where warrants of the West India Dock Company (for sugars deposited in their warehouses) were exhibited by a purchaser to the clerk of the company,—this was holden sufficient to divest the seller of any reputed ownership, though *no actual transfer* was made in the company's books. (2)

*What possession.*

shewn and assented to by the wharfinger.

Where it is the known practice of a public company, to deliver goods to the mere *holder* of their warrants, without any indorsement on the warrant by the original owner of the goods,—in that case, the bare possession of the warrants by any one, to whom they are delivered for a valuable consideration, is sufficient to rebut a case of reputed ownership in the person, to whom the goods originally belonged. Thus, where a trader had pledged for value warrants for goods in the East India Company's warehouses—(which warrants are current in the market, and transferable without indorsement, and the goods are delivered to the person who brings the warrants to the warehouse); and the trader became bankrupt whilst the warrants were in the possession of the pawnees;—it was held, that the goods were not in the possession, order, and disposition of the bankrupt at the time of the bankruptcy. (3)

Or where delivery warrants, (transferable without indorsement,) are in the hands of a *bonâ fide* holder.

But, where a captain in the East India Company's service assigned his privilege (which consists in shipping goods to the extent of a certain tonnage from the East Indies to England) to one Taylor for a valuable consideration, in breach of an express law of the Company, which prohibits

As to proceeds of goods of a captain in East India Company's service.

(1) *Lucas v. Dorrien*, 7 Taunt. 278. 1 Moore, 29. *Harman v. Anderson*, 2 Camp. 245.

(2) *Ibid.* *Spear v. Travers*, 4 Camp. 251. It was observed by the special jury in this case, that, in practice, the indorsed dock warrants are handed from seller to buyer, as a complete transfer of the goods. (4 Camp. 253.; and see 8 Taunt. 290. Per Dallas J.) In all these cases, therefore, it should

seem, that the dock warrants having been once exhibited by the holder to the proper officer of the company, are in themselves the true symbols of the ownership of the goods. And, indeed, they are now declared to be so by the recent act of 6 G. 4. c. 94. s. 2.; and see post, "Lien."

(3) *Greening v. Clark*, 4 B. & C. 316.

*Reputed  
ownership.*  
—

such assignments ; — and in order to evade this law, the goods were shipped, entered, warehoused, and sold by Taylor in the *captain's name*, and the proceeds carried to *his account* — but, before they were handed over by the Company, the captain became a bankrupt — and Taylor was in possession of no document, which he could have carried to market for the purpose of disposing of the goods, or the proceeds ; — it was held, in this case, that the assignees were entitled to recover the amount, in an action for money had and received against the East India Company — the proceeds being considered to be within the order, and disposition, of the bankrupt at the time of the bankruptcy. (1)

Goods on  
sale or  
return,  
pass to  
assignees.

Special ex-  
ception.

Where goods have been bought by a bankrupt *upon sale or return* — such goods, when in his possession at the time of his bankruptcy, are held to pass to his assignees ; as they appear to the world to be his property, and are calculated to give him a delusive credit. (2) But where goods were sent from London to Sunderland, on sale or return, with directions to the buyer to *return such of them as were not approved of* by him, in as short a time as possible ; and the goods arrived at the shop of the buyer only the day before he committed an act of bankruptcy ; — it was held, under these circumstances, that the goods did not pass to his assignees, as a *reasonable time* had not elapsed after the arrival of the goods, to enable the buyer to select such, as he might be disposed to retain. (3) There may be an *usage*, also, in a particular trade, to send goods on *sale or return*, though there is no agreement to that effect between the parties ; but then the usage must be certain, and must be strictly proved. (4) The meaning of such a contract or usage is, not to place the purchaser upon the footing of a factor — though he, like a factor, until

There may  
be an  
usage of  
this kind.

Meaning  
of the  
contract.

(1) *Gordon v. E. I. Company*,  
7 T. R. 228.

(2) *Livesay v. Hood*, 2 Camp.  
85. Sed vide per Abbott C. J.  
*Delaunay v. Barker*, 2 Star. 542.

(3) *Gibson v. Bray*, 8 Taunt. 76.  
1 Moore, 519.

(4) *Wood v. Wood*, 1 Carr. 59.

lately, had no authority to pledge (1) — but to vest the property of the goods in him so far, that he may sell them either for money or credit, and receive the proceeds; — and if he is unable to sell them, the vendor cannot call upon him for the value of the goods — but has only a right, if his bankruptcy does not intervene, to reclaim them *in specie*. (2)

*What pos-  
session.*

When goods, however, are *once delivered* to a vendee upon an *ordinary contract of sale*, the property is wholly changed by the delivery, notwithstanding the goods may be obtained by the vendee, even with *intent to defraud* the vendor of the price; and the latter cannot take them back, after an act of bankruptcy committed by (3) the vendee; though, perhaps, if the goods had been obtained by the vendee under *false pretences*, then the vendor might recover them back from the vendee, or his assignees. (4) And a *delivery* of goods *cannot be qualified* by any *secret* stipulation between the vendor and purchaser, so as to defeat the claims of the assignees of the purchaser, in case he becomes bankrupt; nor, even though the goods are not actually delivered, will any *secret* stipulation have that effect, if the vendee be permitted to exercise such a *control* and *management* over the goods down to the time of his bankruptcy, as to give him the *appearance* of being the real owner. Thus, where a bankrupt had entered into an agreement, that in the event of his becoming bankrupt, or insolvent, before payment made of a quantity of standing timber purchased by him, that the vendor should retake the same, — it was held, that if the bankrupt had the order and disposition of the timber, it would pass to his assignees. (5)

When goods sold are once delivered, property changed.

Delivery cannot be qualified by *secret* stipulation. Purchaser having control over goods, equal to delivery.

(1) See now 6 G. 4. c. 94. s. 5. post, "Lien."

(2) Per Gibbs C. J. 1 Holt, 556.

(3) *Milward v. Forbes*, 4 Esp. 171.; but see post.

(4) *Gladstone v. Hadwen*, 1 M. & S. 517.; and see post.

(5) *Holroyd v. Gwynne*, 2 Taunt.

176. The circumstance of the property in question in this case being *part of the freehold*, and therefore not within the provision of the statute (which applies only to *personal property*), does not appear to have been adverted to. See ante, 403.

*Reputed ownership.*

Where property removed on eve of bankruptcy.

It has been held in one case, that if the real owner of property, such as household furniture, permits it to remain so long in the possession of the bankrupt, as to give him the reputed ownership of it in the opinion of all who deal with him; and the owner only takes possession of it *the day before* the bankruptcy, — that such re-possession is fraudulent against the creditors (1); and that the property passes to the assignees. But we have already seen, that in a case of property lying at a wharf, where it did not appear that persons were *deceived* by any apparent ownership of the bankrupt, and the real owner only took possession of it *one day before* the bankruptcy, that the transaction was not impeached on that account. (2) Though, where the removal of the property takes place on *the very same day* on which an act of bankruptcy is committed — notwithstanding, in point of time, it is really before the *actual commission* of it — then it has been held, that the rights of the assignees attach. (3)

Newspaper assigned, without affidavit of change of interest.

Share of a director in a public company.

Where the printer and publisher of a *newspaper* assigned his interest in it to a creditor, as a security, but continued to print and publish it as before, and no affidavit of the change of interest was delivered to the commissioners of stamps, — it was held, on his bankruptcy, that the right to the newspaper passed to his assignees. (4) So, where a director of a public company assigned his shares to the company, in order to secure a debt due from him on his private account; and empowered the company to direct the treasurer to retain the dividends, and sell his shares for the payment of his debt; but the power given to the company had not been exercised, and his share still remained in his name; — it was held, that on the bankruptcy of the director the shares passed to his assignees, as being in his order and disposition; but that the company had a right

(1) *Darby v. Smith*, 8 T.R. 82.

(2) *Arbouin v. Williams*, 1 Ry. & M. 72. Ante, 412.

(3) *Ibid.*

(4) *Longman v. Tripp*, 2 N.R. 67.

to set off the bankrupt's debt, against the dividends due to him at his bankruptcy. (1)

What pos-  
session.

Where the bankrupt had a *patent* for an invention, and, after having mortgaged his right in it, continued in the notori-ous use of the invention until his bankruptcy, — Lord Eldon was inclined to think, that the right passed to the assignees; but he directed a case for the opinion of the Court of King's Bench; — which, however, was never argued. (2)

Patent,  
where  
patented  
continued  
to use the  
invention.

The possession of the bankrupt, in order to bring a case within the statute, must be *with the consent and per- mission* of the true owner. (3) Therefore, where stock standing in the name of the accountant-general was mort- gaged to secure a debt, and the accountant-general after- wards, without the *privity* of the mortgagee, transferred the stock to the mortgagor, — it was held, that it did not pass to the assignees on the bankruptcy of the mort- gagor. (4)

Possession  
of bank-  
rupt must  
be with  
consent of  
true owner.

So the property of *infants*, who are not capable in law of giving consent, is not affected by a case of *reputed ownership*. (5) But where a *trustee* for infants contracted to sell goods, and he afterwards let the purchaser into possession, — in this case, the property was holden to be within the statute; the trustee being considered the true legal owner of the property, and the purchaser being in possession with his consent. (6)

As to pro-  
perty of  
infants.

If a bankrupt retains an *adverse possession* of goods up to the time of his bankruptcy, so that the party entitled to them could not obtain the possession, or restrain him from disposing of them, without suing him in a court of justice, — such a possession of the bankrupt will, of course, not be within the meaning of the statute; as this is *against* "the consent and permission of the true owner." (7)

Adverse  
possession.

(1) *Nelson v. London Assurance Company*, 2 Sim. & S. 299.

(2) *Ex parte Granger*, Evans's Statutes of Bankruptcy, 64.

(3) *West v. Skip*, 1 Ves. 243.

(4) *Ex parte Richardson*, Buck, 480.

(5) *Viner v. Cadell*, 3 Esp. 88.

(6) *Ex parte Dale*, Buck, 565.

(7) *West v. Skip*, supra. *Litt v. Cowley*, 7 Taunt. 169.

*Reputed  
ownership.*

Where a  
secret  
partner,—  
all the  
property  
passes to  
assignees  
of osten-  
sible  
partner.

In the case of a *secret partnership* between the bankrupt and another person, where the stock in trade is in the sole possession of the bankrupt,—Lord Alvanley upon an occasion of this kind expressed great doubt, whether the claim of the *secret partner* to a share in the joint property could be sustained, against the claims of the assignees. (1) And, indeed, a possession of property under these circumstances, seems to come within the very terms of the above enactment as to reputed ownership. The Court of Exchequer, however, in a case of this description determined, that the claim of the secret partner was sustainable (2); though Lord Eldon, on a subsequent occasion, intimated a strong opinion to the contrary, but reserved the decision of the point for the assistance of those Barons, who had concurred in deciding in favor of the claim of the secret partner. (3) This point, however, appears now to have been finally settled by the Court of King's Bench, upon a case lately sent for its opinion by the Lord Chancellor; in which the judges unanimously agreed, that where there was a *secret partnership*, all the property and effects, as well as the debts due to the concern, must be deemed to be in the order and disposition of the ostensible partner,—and therefore passed to his assignees. (4)

Where  
property  
cannot be  
delivered.

*Ships at  
sea.*

Where property is of such a nature, that it cannot be absolutely delivered (at the time of the contract) to a purchaser, then it will be sufficient, if those documents and instruments relating to it are delivered, which will enable him to reduce the property into possession. Thus, in the case of *ships at sea*, and their cargoes, of which an absolute delivery of possession cannot be made,—it will be sufficient, if the bill of sale, or bill of lading, is delivered to the purchaser; provided he takes possession of the property, upon the arrival of the ship in port. (5) But, in the case of the

(1) *Binford v. Dommett*, 4 Ves. 256.; and see *ex parte Wilson*, ex 758.; and see *ex parte Barrow*, parte Todd, Buck, 55. 2 Rose, 252. (4) *Ex parte Bräuerby*, 2 B. & C.

(2) *Coldwell v. Gregory*, 1 Pri. 399. 119.

(3) *Ex parte Dyster*, 2 Rose, 160.

(5) *Brown v. Heathcote*, 1 Atk.



sale or mortgage of the *ship*, it is necessary, that all the provisions of the *registry act* (1) should be strictly complied with; otherwise, the purchaser will not be entitled to hold the ship, as against the assignees of the vendor, or mortgagor. (2) The bill of sale of a ship at sea is held now to pass the *absolute property* in her, subject only to be divested, in case of the indorsement on the certificate of registry not being made within the proper time (which is now thirty days) after the arrival of the ship in port. (3) And a power of attorney, to sign an indorsement on the certificate, is not revoked by the subsequent bankruptcy of the vendor, — being only a power to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy. Therefore, if the indorsement is made within the limited time under such a power of attorney, though after the bankruptcy of the vendor, it will be a sufficient compliance with the terms of the *registry act*. (4)

What possession.

Where the purchaser, however, has an opportunity of taking possession of the ship, either by her being at home at the time of the purchase, or by her returning to port, he must in that case take *actual* possession; otherwise, though all the requisites of the *registry act* are complied with, the transaction will come within the operation of the above enactment, as to the reputed ownership of the bankrupt. (5) But though the purchaser do not take actual possession as soon as he might, — yet, if the rights of no third person interfere, he may, afterwards, take legal possession.

But where purchaser CAN take possession, he must do so.

(1) 4 Geo. 4. c. 41. s. 35, 6, 7, &c. which repeals all the former registry acts.

(2) *Mass v. Charnock*, 2 East, 399. *Rollaston v. Hibbert*, 3 T. R. 406. *Rollaston v. Smith*, 4 T. R. 161.

(3) *Dixon v. Ewart*, 3 Meriv. 322. Buck. 94.; and see 4 Geo. 4. c. 41. s. 37.; and post, "Relation."

(4) Ibid.; and see *Lempriere v. Pasley*, 2 T. R. 485.

(5) Ex parte *Matthews*, 2 Ves. 272. *Wall v. Gurney*, 1 C. B. L. 342. *Atkinson v. Maling*, 2 T. R. 462. *Mair v. Glennie*, 4 M. & S. 240. *Way v. Fairbairn*, 2 B. & A. 193. *Robinson v. Macdonnel*, 5 M. & S. 228. *Monkhouse v. Way*, 4 Moore, 549. 8 Pri. 256. 2 B. & B. 14.

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ownership.

of the ship—if he does so before the bankruptcy of the person, who executed the bill of sale to him. (1) And if, at the time of the sale, the ship is in any *foreign port*, then the purchaser need not take actual possession of her; and the port of *Dublin* is, in this respect, considered a foreign port. (2)

Where  
purchase  
only of a  
share.

Where the purchase is only of a SHARE in the ship, then the delivery of the bill of sale of such share (provided the requisitions of the registry act are in other respects complied with) will be a good delivery to vest a title in the purchaser. (3) And in a case where a ship-builder contracted to build a ship to be paid for by four instalments, three of which were paid—and he then signed the usual certificate in order to have the ship registered—and the ship was accordingly registered in the name of the purchaser—but was not then completed or launched, and was still in the possession of the ship-builder;—it was decided, that the legal effect, of the ship-builder's having signed the certificate for registry in the name of the purchaser, was to vest the general property in the ship, from the time the registry was completed;—and that the ship was not in the possession (4) of the bankrupt, as reputed owner. But where a barge, (which is not required to be registered) after being completed, remained in the boat-builder's hands—though the purchaser's name was painted on the stern, and he had advanced money as the building of it went on, to the full value of the barge—but the builder had done no act expressing an unequivocal consent, that the general property should be considered as vested in the purchaser;—in this case it was held, that, as there had been *no actual delivery* to the purchaser, the property (5) was in the order and disposition of the bankrupt.

Where a  
barge  
built, but  
not delivered.

(1) *Robinson v. McDonnell*, 2 B. & A. 134.

(2) *Ex parte Batson*, 1 C. B. L. 345.

(3) *Ex parte Standgroom*, 1 C. B. L. 348. 1 Ves. 163.; and see

*Gillespie v. Cotts*; Amb. 652. and *Hall v. Gurney*, 1 C. B. L. 342.

(4) *Woods v. Russell*, 5 B. & A. 942.

(5) *Mucklow v. Mangles*, 1 Taunt. 318.; and see post.

But, though the purchaser forfeit his title to the ship, as against the assignees of a bankrupt, by neglecting to take possession of her whilst she is in port, — he will still be entitled to the produce of a *policy of insurance* on her (which is assigned to him at the time of the bill of sale) in the event of a loss happening to the ship at sea before the bankruptcy. (1) And, though the policy was detained by the broker who effected it, as a pledge for a debt owing to him by the bankrupt; and the assignees obtained possession of it by paying that debt; — yet they were held not entitled to retain it against the person to whom it was assigned; as this was considered not such a leaving of the policy in the hands of the bankrupt, as to give him the entire order and disposition of it. (2)

*What possession.*

Where purchaser, though not entitled to ship, entitled to policy of insurance.

Under a commission of bankrupt against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, are held to form part of the joint estate. (3)

Ship registered in name of one partner.

An *executory* contract for the sale of a ship is within the provisions of the register act, and must, therefore, be indorsed on the certificate of registry. (4)

Executory contract.

Where the transfer of the ship, however, is not an *absolute* transfer, but merely made as a *security* for a debt, or by way of *mortgage*, then, as we have seen (5), by the provisions contained in the 72d section of the new act, it is excepted out of the enactment as to reputed ownership, — provided those requisitions of the registry act are complied with, which relate to transfers of ships by way of mortgage. And by the new register act (4 Geo. 4. c. 41. s. 43.) it is now expressly declared, that the person to whom such security or mortgage shall be made, shall not, by reason thereof, be deemed to be the owner of the ship or vessel, or of the share so transferred, nor will the person making

Where ship mortgaged, not a case of reputed ownership.

(1) *Falkner v. Case*, cited 2 T.R. 491.

(2) *Ibid.* 1 Bro. 125.

(3) *Ex parte Burn*, 1 Jac. & W. 378.

(4) *Mortimer v. Fleming*, 4 B. & C. 120.

(5) *Ante*, 402.

Reputed ownership.

the transfer be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship, or the share so transferred, available by sale or otherwise for the payment of the debt, for securing payment of which such transfer shall have been made. And by the 44th section of the same act it is also provided, that when any such transfer shall have been duly registered, the right of the mortgagee shall not be affected by any act of bankruptcy committed by the mortgagor after the time of such registry, notwithstanding the mortgagor, at the time he became bankrupt, had in his possession, order, and disposition, and was the reputed owner of, the ship, or the share so mortgaged; but such mortgage shall take place of, and be preferred to any right of the assignees of such bankrupt in such ship or share so transferred. (1)

So where the best delivery made, that circumstances will admit.

And in all cases, where the *best delivery* is made upon the sale of goods, which the nature of the property sold, and the circumstances under which it is sold, will admit, the case will then not be considered as one of reputed ownership. Thus, where the bankrupt contracted with a canal company to build locks and bridges on the canal as their engineer, and purchased timber and other materials for the purpose, which were laid on the company's premises; and, on the company advancing money to him, they took a bill of sale of these goods, and a *nominal delivery* of them by a half-penny, — it was held, that the bankrupt had not, under these circumstances, such a possession of the timber, as would enable the assignees to claim it in opposition to the bill of sale; for that, the timber being before the sale on the company's premises, the best delivery was given of it, which the circumstances would admit. (2)

When chose in action assigned, the security

Whenever a *chose in action* is assigned, the security, if there be one, must in all cases be delivered over at the time of such assignment. And, in order completely to divest the bankrupt of the ownership of *debts*, he must, in

(1) See ante, 403. note (1).

(2) *Manton v. Moore*, 7 T.R. 67.

assigning them, have done every thing that is equivalent to the delivery of chattels personal. (1) Thus a *bond*, when assigned, must be delivered up to the assignee. (2) But, in the case of mere *book-debts*, there is nothing that can be delivered; except, indeed, when one partner assigns all his share in the partnership debts to the other; in which case the deed of co-partnership must be delivered up. And whenever a debt is assigned, *notice* of the assignment must be given to the debtor, whether there is a security for the debt, or not (3); for otherwise the obligee — in the case of the bond — or indeed any other assigning creditor, would be enabled to obtain payment of the debt, — which is tantamount to leaving it in his order and disposition. Therefore, in the event of a dissolution of partnership, notice in the *Gazette* of such dissolution has been held not sufficient notice to the partnership debtors, unless it could be reasonably inferred that they had seen it. (4)

What possession must be given up,

must be given up,

and notice given to the debtor.

Where the bankrupt (upon borrowing a sum of money) drew an order, in favor of the lender, for payment of the money out of a particular fund due and to become due to him, and the order was deposited by the payee with the person on whom it was drawn, — it was held, in this case, that the money did not pass to the assignees, but was to be appropriated to the payment of the order. (5) So an *accommodation acceptance*, in the hands of the drawer at the time of his bankruptcy, does not pass to his assignees; and may, therefore, be indorsed by him after he had committed the act of bankruptcy. (6)

Money in hands of third person, already drawn for by bankrupt.

Accommodation acceptance.

The possession of a *carrier*, by whom the bankrupt sends money or goods to a creditor, does not alter the Possession of a carrier.

(1) Per Sir W. Grant, *Jones v. Gibson*, 6 Ves. 410.

(2) *Ryal v. Rowles*, 1 Ves. 348. 1 Atk. 177.

(3) *Ibid.* Ex parte *Monro*, Buck. 300. Ex parte *Burton*, 1 G. & J. 207.; and see ex parte *South*,

3 Swanst. 393. Ex parte *Alderson*, 1 Mad. 53.

(4) Ex parte *Osborne*, 1 G. & J. 356.

(5) *Row v. Dawson*, 1 Ves. 831.

(6) *Wallace v. Hardacre*, 1 Camp. 46. *Willis v. Freeman*, 12 East, 656.

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property; for, the possession of the carrier is, in this respect, the possession of the bankrupt. Therefore, where the bankrupt shortly before his bankruptcy drew a bill, and after procuring it to be discounted, gave a creditor an order to receive the amount, which he directed A. (who discounted the bill) to transmit to the creditor; and whilst the money was in the hands of the carrier, the bankrupt committed the act of bankruptcy, — the creditor, who afterwards received the money, was held liable to refund it to the assignees. (1)

Where an  
uncertifi-  
cated  
bankrupt  
bought his  
own stock.

In a case, where a bankrupt bought his own stock in trade of his assignees, and sureties joined in a security to them for the consideration; and the bankrupt continued to trade for four years afterwards, and then died without having obtained his certificate, having contracted fresh debts subsequent to his bankruptcy, — Lord Camden held, that the subsequent creditors were to be preferred to the creditors under the commission, (2) But Lord Eldon, in observing upon this case, said, that it had never been considered of very high authority; for that, unless the bankrupt had purchased the stock with the money of a third person, it was purchased with that which was the property of the assignees, — and, in that case, the sale would have been without consideration. (3) And where a bankrupt (who had obtained his certificate) was employed by the assignees, as their agent, in getting in the debts; and was permitted by them to remain in possession of his furniture, household goods, and plate, and to continue to inhabit his house for nearly five years, in order the better to assist the assignees in settling his affairs, during which time he engaged in trade on his own account; but in all the statements of his estate and effects, which were laid before his creditors at different periods, the furniture, &c. (which had been in-

Where  
bankrupt  
permitted  
to occupy  
his house  
and furni-  
ture as the  
agent of  
assignees.

(1) *Harvey v. Liddiard*, 1 Star.  
145.

(2) *Troughton v. Gitley*, Amb.  
630.

(3) *Ex parte Martin*, 15 Ves.  
116.

re-entered and valued immediately after the commission issued) was included: a second commission having issued against him, — the question was, whether his possession under these circumstances was not such, as entitled the assignees under the second commission to the goods, as being in his order and disposition as reputed owner, — and the Court of King's Bench held that it was not. (1) Where, also, an uncertificated bankrupt hired a shop, and carried on business there for some time, living with his son, and goods were supplied in the name, and on the credit, of the son — though, in one or two instances, the father had guaranteed the payment — it was held, that the goods under these circumstances did not belong to the assignees. (2)

What pos-  
session.

And it has been recently decided, that goods, which (with the consent of the true owner) come to the possession of the bankrupt after he becomes bankrupt, do not vest in the assignees under the above provision as to reputed ownership; and a person "becomes a bankrupt" on committing the act of bankruptcy, which is followed up by a commission. (3)

Where  
goods  
come to  
bankrupt's  
possession  
after the  
bank-  
ruptcy.

So, the bare possession of goods entrusted to the bankrupt for a specific purpose, without any power given him to dispose of them, is not sufficient to make it a case of reputed ownership — unless the owner has been guilty of laches, in permitting them to remain so long in the bankrupt's possession, or under such circumstances, as to give him a reputed ownership — and thus enable him to gain a false credit. (4) Therefore, a carpenter who receives timber to convert into a waggon, or a tailor to whom cloth is delivered to be worked up into clothes, have neither of them such a possession of the timber, or the cloth, as will constitute him a reputed owner of it within the meaning of the statute. (5) And even if money be left with

Possession  
of goods  
for a spe-  
cific pur-  
pose.

Or of mo-  
ney, if

(1) *Walker v. Burnell*, Doug. 803.

(3) *Lyon v. Weldon*, 2 Bing. 334.

(2) *Davis v. Leving*, 1 Holt. 275.; and see *Stafford v. Clark*, 1 Carr. 24.

(4) *West v. Skip*, 1 Ves. 243.

(5) Per Ashurst J., 3 T. R. 523.

**Reputed  
ownership:  
FACTOR.**

—  
kept se-  
parate.

Or of a  
banker's  
cheque,  
not within  
the sta-  
tute.

Timber  
supplied  
for par-  
ticular  
works.

a bankrupt, for a *particular purpose*, provided it be kept apart from his general property,—that also cannot be claimed by his assignees; as in the case of an owner of *the poor*, who kept the money received by him in that capacity distinct from his other effects. (1) And where a friend agreed to lend a bankrupt 200*l.*, to be applied to a *specific purpose*, and placed in his hands a cheque on his bankers for that amount, and the bankruptcy took place before the cheque was paid,—it was held, that the assignees had no right to the cheque. (2) So, where a merchant bought and shipped timber in his own name to one of the King's yards, where it was delivered for the use of the bankrupt (a carpenter), who had contracted to perform some works there, and who was secretly an agent of the merchant,—it was held, that as the timber was delivered only for the *purposes of the contract*, and as there was no sale of it to the bankrupt, the real *property* was in the merchant; and that, as there was no fraud in the transaction, the bankrupt's assignees were not entitled to it; for though the bankrupt had the APPARENT, he had not the *absolute* disposition of it. (3)

### 3. Possession as Factor (4), Banker, or Broker.

**Factor's  
possession  
not a case  
of reputed  
ownership.**

The possession of goods by the bankrupt as *Factor*—though he has the power of immediately selling, or pledging (5), them, and taking the money—is (for the benefit of trade) held not such a possession, as will constitute a case of reputed ownership; for his possession of the property is, only, under a bare authority to sell it for the principal, and to account to him for the proceeds. A Factor, indeed, stands in the situation of a trustee with his principal; and what-

(1) *Rex v. Egginton*, 1 T. R. 570. 316.; but see 7 T. R. 237., per

(2) *Moore v. Barthrop*, 1 B. & Lawrence J.  
C. 5.

(3) *Collins v. Forbes*, 3 T. R.

(4) And see post, "Lien."

(5) See 6 G. 4. c. 94.



ever property he has in his possession *in that character* at the time of his bankruptcy, and which can be distinguished from his own, belongs to his principal, and does not pass by the assignment. (1) And even if the goods be sold and reduced into *money*, provided the money be in *separate bags*, or in other respects *distinguishable* from the rest of the factor's property, (as in the case of the overseer before mentioned (2)) — the principal, and not the assignees, will be entitled to it (3); for the *dictum*, that money has no *ear-mark*, must be understood to apply only, in a case of an *undivided* and *undistinguished* mass of current money. (4) So, if the factor receives notes or bills, instead of money — or buys other goods with the proceeds, — the principal will be equally entitled to the bills, or the goods so bought (5); for the product of, or substitute for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be the very product, or substitute; and the right of the principal to reclaim it only ceases, when the means of ascertainment fail.

*Reputed ownership: FACTOR, &c.*

Thus where a FACTOR, having money of his principal in his hands, bought South Sea stock for him, and took the stock in his own name, but entered it in his account-book, as bought for his principal, and afterwards became bankrupt, — it was determined, that the stock was not liable to the bankruptcy. (6)

*Factor buying stock in his own name.*

And the same rule prevails, as to the right of a principal to reclaim *substituted property* from a *Factor*, or *Broker*, notwithstanding such substituted property has been acquired *in fraud*, and *not in pursuance* of his trust; for an

(1) *Burdett v. Willett*, 2 Vern. 638. *L'Apostre v. Le Plaistrier*, cit. 1 P. Wms. 318. *Mace v. Cadell*, Cowp. 233. *Ex parte Dumas*, 2 Ves. 586. 1 Atk. 232. *Godfrey v. Furzo*, 3 P. Wms. 185. *Boddy v. Esdaile*, 1 Carr. 62. *Garraat v. Callum*, B.N.P. 42.; and see 6 G. 4. c. 94. s. 5.

(2) *Ante*, 426.

(3) Per Lord Kenyon, *Tooke v. Hollingworth*, 5 T. R. 215. 1 T. R. 370. *Paul v. Bird*, 2 Atk. 621.

(4) 3 M. & S. 575. per Lord Ellenborough.

(5) *Ex parte Sayers*, 5 Ves. 169. *Whitcomb v. Jacob*, 1 Salk. 160. *Scott v. Surman*, Willes, 400. 1 Atk. 234.

(6) *Ex parte Chions*, 3 P. Wms. 186.

*Reputed  
ownership:  
FACTOR,  
&c.*

Broker  
embezzling  
a draft,  
and buy-  
ing Ame-  
rican  
stock, &c.

abuse of trust confers no greater rights on the party, nor on his assignees, who claim in privity with him. Therefore, where a draft for money was entrusted to a broker to buy exchequer bills for his principal; and the broker received the money, and misapplied it, by purchasing American stock and bullion, intending to abscond with it and go to America; and he did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the stock and the bullion;—the principal was, in this case, held to be entitled to such securities and bullion, as against the assignees of the broker, who became bankrupt on the very day, on which he so received and misapplied the money. (1) And Lord Ellenborough in his judgment in this case said, that if property, in its original state and form, was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust; or give the factor, or those who represent him in right, any claim of greater validity in respect to it, than they respectively had before such change. (2)

Neither will the rights of the principal be altered in this respect, though the factor acts under a *del credere* commission; for this does not deprive the principal of his remedy against the buyer, if there be no payment to the factor (3); but if a factor conceal the name of his principal, and sell in his own name, the buyer has a right then to consider him as the principal, — and will be entitled, in an action by the real owner for the price, to set off a debt due from the factor. (4)

When  
principal  
should give  
notice to  
purchaser.

If the goods have been sold by the factor, and are not paid for at the time of his bankruptcy, the principal should give notice to the purchaser, not to pay the factor, or his assignees; and if the purchaser will do so in spite of such

(1) *Taylor v. Plumer*, 5 M. & S. 562.

(2) 5 M. & S. 574.

(3) *Scrimshire v. Alderton*, 2 Str. 1182.

(4) *George v. Clagett*, 7 T. R. 359. *Rabone v. Williams*, *cit. ib.*

360. *Bayley v. Morley*, *ibid.* *Stracey v. Deey*, *ibid.* 361.; and see 6 G. 4. c. 94. s. 6.

notice, he will then be liable to repay the money to the principal (1); or, if the assignees receive the money, the principal will be entitled to recover the amount from them. (2)

Reputed  
ownership.  
BANKER.

Upon the same principle, too, as that of the right to reclaim goods from a factor, is founded the right of a customer to re-possess himself of what are called *short bills*; that is, bills not due, in the hands of his Banker. For if such bills, or notes, are sent to a banker to be *specifically applied*, and he becomes bankrupt without having parted with them, they do not pass by the commissioners' assignment. (3) But, if the bills are *indorsed* by the person who deposits them with the banker, and the latter disposes of them before his bankruptcy, though even contrary to good faith, — in that case, they cannot be recovered by the customer. (4)

Short  
bills;

The nature of the interest, however, which the assignees of a Banker possess in bills and notes remaining in his hands at the time of his bankruptcy, depends on the circumstances, under which the bills or notes have been remitted, or paid in, by his customer, — as well as upon the state of accounts between the customer and the banker, at the time of the bankruptcy. If the bills have been *discounted* with the banker, the property is then changed, and they pass to his assignees with the rest of the effects; or, if he has *advanced* money upon them, or accepted other bills for the accommodation of the customer, the assignees will not only have a lien upon all the negotiable securities in the banker's hands, to the amount of such advances or accept-

if dis-  
counted,  
pass to the  
assignees;

(1) *Strimshire v. Alderton*, supra. *Escot v. Milward*, 1 C. B. L. 378. 7 T. R. 361 note (b.)

(2) B. N. P. 42. *Scott v. Surman*, supra. Ex parte *Murray*, C. B. L. 379.

(3) Ex parte *Dumas*, 1 Atk. 233. Ex parte *Orrell*, Amb. 297. 2 Ves. 586. Ex parte *Emery*, 2 Ves. 674. *Tooke v. Hollingworth*, 5 T. R. 215.

2 H. B. 501. *Parke v. Blinson*, 1 East, 544. Ex parte *Sayers*, 5 Ves. 169. *Zinck v. Walker*, 2 Bl. 1154. Ex parte *Maddison*, 1 C. B. L. 384. *Hassall v. Smithers*, 12 Ves. 119. Ex parte *Smith*, Buck, 355. Ex parte *Aiken*, 2 Mad. 192. (4) *Collins v. Martin*, 1 B. & P. 648. *Bolton v. Puller*, ibid. 539. Ex parte *Pease*, 1 Rose, 238.

*Reputed  
ownership:  
BANKER.*

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and so  
where an  
exchange  
of accept-  
ances;

except  
when.

When  
must be  
given up  
by the as-  
signees.

ances, — but may also put the same in suit. And even where, taking into account the bills on both sides, the customer has a balance in his favour, but not equal to the amount of *any one* of the bills, — this surplus cannot be appropriated to any *one* bill, in reduction of the claim of the assignees suing any of the parties to such bill. (1) Where the transaction with a banker amounts to an exchange of acceptances, his assignees are in that case entitled to the bills so taken by him in exchange; — as where a person, with whom a country banker has no previous dealings, applies to him for a bill on London, in return for bills of exchange of the *same amount*, though the bill given by the banker be dishonored, yet the bills given in exchange will pass to his assignees. (2)

But where a customer agreed to pay into a bank (consisting of four partners) bills of exchange indorsed, and to take in return their promissory notes — and three of the four partners became bankrupt before the bills were paid in, or their notes taken — and after this was done, then the fourth became bankrupt, — it was held in this case, that the assignees were not entitled to retain the bills so paid in; the consideration having failed, upon which alone they were parted with. (3)

So bills paid in generally, to be received when due, and then to be placed to the account of the customer, must be given up by the assignees, — provided the cash account is in favour of the customer, and the banker's estate is not chargeable with any outstanding engagements on the customer's behalf. For it is perfectly clear, as a general rule, that if a customer pays bills into his banker's, although it gives him a right to expect that his drafts will be honored to the amount of the bills paid in, yet the *property* in the bills is not altered — they still remaining the property of the customer — although the

(1) *Bolland v. Bygrave*, 1 Ryan & M. 271.

(2) *Hornblower v. Proud*, 2 B. & A. 527.

(3) *Ex parte M'Gae*, 2 Rose, 376.

banker may have a lien to the extent of his advances. In order to change the property, it must be shown that the banker bought the bills — or discounted them — which amounts to the same thing. (1) And, though bankers may have authority from their customer to discount bills remitted by him, to a certain amount, or for certain purposes, — yet this will not give them an absolute authority to discount *all* bills, which may be paid in by the customer. Nor, indeed, will it make any material difference, that the special authority to discount is for an uncertain amount, and one which cannot well be ascertained at the time it is given; — as, where the object is to provide a fund to honor the drafts or bills of the customer, or to reduce the cash balance, when the bankers should be in advance. (2)

*Reputed ownership of BANKER.*

Bills not due, which are entered short in the banker's books, are always considered to be the property of the customer; and must be specifically returned to him, if the cash account is in his favour. But, if they are paid in by the customer as cash, or are entered as cash with his knowledge or consent, deducting the discount, — and he thereupon draws, or is entitled to draw upon the bankers, as having that credit in cash, — it has been decided by Lord Eldon, that the customer will be precluded from recurring to the bills, specifically; and that such knowledge or concurrence, on the part of the customer, may be inferred from the usual mode of dealing between the parties. (3) But, notwithstanding the customer has permission to draw on the bankers to the amount of the bills paid in, yet, if they are entered as *BILLS* in the banker's books — and the cash balance, independently of the bills, is in favor of the customer at the time of the bankruptcy, — the customer has, in that case, a right to have all the bills remaining in specie

*Bills entered short, must be given up. Contra, when paid in as cash.*

*But if entered as bills, do not pass*

(1) *Per Holroyd J., Thompson v. Giles*, 5 B. & C. 451.

(2) *Ex parte Wakefield Bank*, 1 Rose, 243. *Ex parte Leeds Bank*, *ibid.* 254.

(3) *Ex parte Sargeant*, 1 Rose, 153. *Ex parte Pease*, *ibid.* 233. 19 Ves. 25. *Ex parte Sollers*, *ibid.* 155. 18 Ves. 229.

Reported  
ownership:  
BANKERS

Indorse-  
ment  
*prima facie*  
evidence  
of dis-  
count.

As to right  
to retain  
bills, aris-  
ing from a  
*general*, or  
a *limited*,  
authority  
to dis-  
count.

delivered up to him by the assignees. And this, notwithstanding such bills were indorsed by the customer; unless it can be shown to have been his *intention* to make an *absolute transfer* of them; for the indorsement may be made merely, to enable the banker more effectually to receive the amount from the other parties on the bills, for the account of the customer: (1) Indorsement is, however, considered *prima facie* evidence of discount, unless the object of mere deposit is clearly shown. (2) If the object is a mere deposit, then it is a breach of faith for the banker to negotiate the bills, unless he is justified in so doing by the state of the customer's account. (3) But (as Lord Eldon has observed in one of the cases upon this subject) it ought to be generally known, that if bills indorsed are remitted to bankers, they may dispose of them effectually — as between the subsequent holder and the remitter — though contrary to the faith of the understanding between the parties; and the remitter can, then, only come in as a general creditor of the bankers. (4)

In the cases which occurred in Boldero's bankruptcy, the Lord Chancellor is reported to have dwelt much on the distinction between a *general*, and a *limited*, authority to discount; — and the bearing of his opinion seems to be, that if bankers have a *general* authority to discount, the customer in that case would have no right to have the bills delivered up; and he is of the same opinion, also, (as has been already observed) when the bills are paid *in gross*, and the customer is entitled to draw, as having that *credit in cash* — in which last case, it is conceived, the bankers would (as a matter of course) have, by legal inference, an authority to discount the bills so paid in. With great deference, however, it is submitted, that there is no solid distinction in law, whether the banker has a *general*, or a *contracted*

(1) *Thompson v. Giles*, 2 B. & C. 422.

(2) *Ex parte Towgood*, 19 Ves. 246; and see 2 B. & C. 429.

(3) Per Bayley J., 2 B. & C. 608.

(4) *Ex parte Press*, 2 Rose, 232.

*Collins v. Martin*, 1 H. & P. 648. Ibid. 546.

*Reputed  
ownership:  
BANKERS.*  
—

authority in this respect, as far as regards the right of the customer to reclaim bills remaining in specie in the banker's hands. The principle, which governs nearly all the cases on this subject, is, that in questions *between a banker and his customer* (though not as between the customer and third persons), the banker is considered precisely in the situation of a *factor* (1); and has only a lien upon the securities in his hands for his general balance. If the factor has converted the goods of his principal into money; — or the banker has negotiated (even contrary to good faith) his customer's securities, and turned them into cash; — then, as money has, generally speaking, no earmark to distinguish it from the common stock, neither the principal in the first case, nor the customer in the last, can have a specific claim for such money against the assignees either of the factor, or the banker, in the event of his bankruptcy. But, unless the property is *actually changed* — either by discounting (2) the bills with the banker — or by the banker himself negotiating them, — it is apprehended, that in whatever way they may have been paid in, or whether the banker had a general, or only a limited, authority to discount, his assignees can have nothing more than a lien for his general balance, if the bills *remain in specie* in his hands at the time of his bankruptcy; and that the customer (if the cash account is in his favour (3)) has a right to have the bills delivered up, upon his indemnifying the estate against any outstanding acceptances (4) of the banker for his own accommodation.

But though a customer has a right to have short bills delivered up to him, if the account is in his favor, — yet the holders of the banker's *outstanding acceptances* in favor of the customer have no such right, notwithstanding the

Holders of  
banker's  
outstand-  
ing accept-  
ances,  
have no

(1) *Collins v. Martin*, 1 Bos. & P. 681. *Thompson v. Giles*, supra. *Mellor v. Fuller*, supra.

(2) *Carstairs v. Bates*, 3 Camp. 201.

(3) And see *Giles v. Perkins*, 9 East, 12.

(4) Ex parte *Buchanan*, 1 Rose, 280. 19 Ves. 201. Ex parte *Rowton*, 1 Rose, 15. 17 Ves. 426.; and see per Holroyd J., 2 B. & C. 481.

*Reputed  
ownership:  
BANKERS,*

claim to  
the short  
bills.

But Lord  
Chan-  
cellor will  
render  
their claim  
available;

except  
when.

short bills may have been expressly deposited to answer such acceptances. For these bill-holders, being no parties to any contract between the customer and the banker, can have no lien even in equity upon such short bills;—the object of depositing which was, not for the security of the persons in whose hands the banker's acceptances might be, but for the security of the banker himself, who became liable on them. But, as the liability of the banker's estate, in respect of such outstanding acceptances, must be exonerated, before any restitution of the short bills can be claimed by the customer—if the customer, therefore, should also become bankrupt, then *his* assignees are bound to leave the banker's estate in the same condition, as the customer must have done himself. And, as the holders of the outstanding acceptances are, in this predicament, entitled to be paid out of the produce of such short bills, though not possessing a direct lien upon them,—the Lord Chancellor will, on petition, order such an arrangement of the property between the two estates of the banker and the customer, as may indirectly render the claim of the bill-holders available. (1) When bankers, however, before their bankruptcy have received out of the produce of part of the short bills, a sum of money more than sufficient to satisfy all their outstanding acceptances for the customer,—their assignees will, then, have no right to retain the remaining short bills to satisfy such acceptances; and, consequently, the holders of the latter will, in this case, have no greater right to be paid out of the produce of the remaining short bills. But, though the bankers may have been in cash sufficient to pay these acceptances, there may still be such a state of accounts between them and their customer, as will give them a lien upon the remaining bills; and, in order to ascertain this state of account, the Lord Chancellor will (on the petition of the bill-holders) refer it to the Master, to inquire, whether the bankers had, at the

(1) *Ex parte Waring, Ex parte Inglis*, 2 Rose, 182. 19 Ves. 345.



time of their bankruptcy, any lien upon the remaining short bills in their hands. (1)

V., a customer of the banking-house of D. and Co., transfers to N. (a partner in the firm) certain stock by way of security for money borrowed of them, and gives also notes for the amount, payable on the stock being re-transferred to him. He pays off these notes; and afterwards borrows a further sum on the joint note of himself and his son, without calling for a re-transfer. The stock so transferred (being blended with other stock, of which N. was in like manner possessed by way of security for other customers) is sold by the partnership, except a small balance still remaining in the name of N. — It was held, under these circumstances, that (the other creditors in respect of stock having been satisfied their demands) V. was entitled to the whole of this balance, as being sufficiently appropriated by the bankers to answer *pro tanto* the stock originally transferred by N. (2)

*Reputed ownership:*  
**BANKERS.**

As to balance of stock appropriated to answer a particular claim.

An order may be applied for to have short bills delivered up, before the assignees are chosen, in case there is a provisional assignee, — to whom such order will be a sufficient protection for what he does, in pursuance of the directions contained in it. (3)

Order for delivery of short bills, against provisional assignee.

#### 4. Possession as Trustee, Executor, or Administrator.

Where the bankrupt is a *Trustee*, and at the time of his bankruptcy has any property belonging to his *cestui que trust* in his possession, which can be distinguished from the mass of his own property, it does not in this case pass to his assignees; for any presumption of reputed ownership, arising from the fact of possession, is rebutted by the circumstance of the trust. Formerly, when a trustee, or executor, became bankrupt, it was the practice, upon the application of the *cestui que trusts*, or other parties in-

Trust property does not pass to assignees.

(1) Ex parte *Parr*, Buck, 191.

(2) *Vulliamy v. Noble*, 3 Meriv. 593.

(3) Ex parte *Buchanan*, 1 Rose,

280. 19 Ves. 201. Ex parte *Burton Bank*, 2 Rose, 162.

*Reputed  
ownership:  
TRUSTEE.*

Lord  
Chan-  
cellor may  
order trust  
stock, &c.  
to be trans-  
ferred.

interested, to appoint a receiver of the trust property, the better to secure the effects for the purposes of the trust. (1) But now, by *section 79.* of the new statute it is enacted, that if any bankrupt shall, *as trustee*, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate (2), or any interest secured upon or arising out of the same; or shall have standing in his name *as trustee*, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, — the Lord Chancellor, on the petition of the persons entitled in possession to the receipt of the rents or dividends, on due notice given to all other persons (if any) interested therein, may order the assignees and all persons whose act or consent thereto is necessary, to convey, assign, or transfer such estate, interest, &c. to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as such estate, &c. were subject to before the bankruptcy; and also to receive and pay over the rents as he shall direct. (3)

Cases  
where  
trust pro-  
perty does  
not pass.

There are many cases, however, which have decided, that trust property does not pass to the assignees of a bankrupt trustee. Thus, where a bill of sale was made to the bankrupt of certain leases and other property, in trust to pay the debts of the assignor, — the possession of such property by the bankrupt was held not to be a case of reputed ownership. (4) So, where a bankrupt had shares in a trading company, in trust for W., who by his will appointed the bankrupt his residuary legatee, — Lord Redesdale held, that the shares were not left in the bankrupt's possession, so as to entitle his assignees absolutely to them; but that they were subject to the debts and legacies of W. (5) And where a

(1) *Ex parte Ellis*, 1 Atk. 101.  
*Ex parte Llewellyn*, 1 C.B.L. 137.  
*Langley v. Hawke*, 5 Mad. 46.

(2) Quære, whether this provision was necessary, as assignees were never considered entitled in any way to trust estates?

(3) This section is an extension

of the 36 G. 3. c. 90. s. 1., which was confined to *government stock*, standing in the name of the bankrupt.

(4) *Copeman v. Gallant*, 1 P. Wms. 524.

(5) *Joy v. Campbell*, 1 Sch. & Lef. 528.

bankrupt, previous to his bankruptcy, assigned to B. for a valuable consideration a debt due from A. to the bankrupt,—the bankrupt was, in this case, held to be a trustee for B., and the debt not to pass under the commissioners' assignment. (1) So where a lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of R.; and on the trial of an issue directed by the Court, it was found that W.'s name was used in the first instance in trust for R.; — it was held, that the lease did not pass to W.'s assignees; and that the declaration of trust, though executed after the bankruptcy, was good in favour of R., within the statute of frauds. (2) And where a testator directed, that in case his son should carry on his (testator's) trade for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside in his house, and have the use of the furniture; and the widow and son carried on the trade and became bankrupt, — it was held, in this case, that the furniture, &c. was not in the order and disposition of the bankrupts, and did not pass to the assignee; — as it was not in the *exclusive* possession of the widow, but only as connected with that of her children — and, as it was also a possession connected with title, and dependant in the possession of the bankrupts upon the same trusts, as it would have been subject to, had it remained in that of the trustees of the testator. (3)

*Reputed  
ownership:  
TRUSTEE.*

The same rule also is established in the case of an *Executor*, or *Administrator*, becoming bankrupt; for the property they possess in either of those capacities cannot be assigned by the commissioners, so as to defeat those who have a right to follow the specific fund (4); not even if such

Where  
bankrupt  
an exe-  
cutor or  
adminis-  
trator.

(1) *Winch v. Keeley*, 1 T.R. 619.;  
and see *Ex parte Byas*, 124. *Un-*  
*win v. O'neer*, 1 Burr. 481.

(2) *Gardner v. Rowe*, 2 Sim. &  
S. 346.

(3) *Ex parte Martin*, 2 Rose, 331.  
19 Ves. 491.

(4) *Ex parte Marsh*, 1 Atk. 159.  
*Ex parte Llewellyn*, 1 C. B. L. 137.

*Reputed  
ownership:*  
EXECU-  
TOR.

Where  
lands come  
to him as  
heir.

Where  
bankrupt's  
wife an  
executrix.

Where  
bankrupt  
executor  
as well as  
residuary  
legatee.

fund consists of *money*, provided it can be *specifically distinguished* and ascertained to belong to the testator, and not to the bankrupt himself. (1) And so, where real estates devolve upon the bankrupt as *heir*, a specialty creditor of the ancestor may follow the real assets, or their specific produce, in the hands of the assignees. (2)

If the bankrupt is the husband of an executrix, the commissioners in this case cannot assign the testator's goods, which are left in the bankrupt's possession; for the wife being possessed of them *in auter droit*, the husband can have them in no better right (3); and the same, with respect to a bond debt due to her as executrix. (4) So, where the wife of a bankrupt administered to her father, and became possessed as administratrix of his effects, to which she and her infant brothers and sisters were entitled; and the husband continued the business of the father for their benefit; — Lord Eldon held, that this was not such a possession of the goods by the bankrupt, as could be deemed a leaving them in his order and disposition with the consent of the owner — as the infants were incapable in law of giving any consent. (5)

Where the bankrupt was executor and *residuary legatee*, and before his bankruptcy collected in sufficient assets to pay the debts and legacies, and the residue consisted of debts and mortgages due to the testator, — Lord Hardwicke said, that in such a case, though they could not in law vest in the assignees, as the bankrupt took them *in auter droit* as executor, yet that the *equitable* interest belonged to the assignees; and that he would not scruple to let them sue in the bankrupt's name to get in the debts. (6) But where a bankrupt, after obtaining his certificate, (which, however, was subsequently held to have been obtained by fraud) became possessed of leasehold premises,

(1) *Howard v. Jemmet*, 3 Burr. 1369. per Lord Mansfield.

(2) *Ex parte Morton*, 5 Ves. 449.

(3) *Ex parte Marsh*, *supra*.

(4) *Ludlow v. Browning*, 11 Mod. 138.

(5) *Viner v. Cadell*, 3 Esp. 88.

(6) *Butler v. Richardson*, 1 Atk. 213. Amb. 74.

as executor and *residuary legatee*, which he mortgaged, and afterwards assigned the equity of redemption to another person; and the deed recited, that the assignment was made for the purpose of paying the debts of the testatrix; and the assignee of the equity of redemption took an assignment of the mortgage; — the claim of the latter was held preferable to that of the assignees under the commission; as *they* could only be entitled to the rights of a residuary legatee, and a residuary legatee is bound by an assignment made by the executor for a valuable consideration. (1)

*Reputed  
ownership:  
EXECU-  
TOR.*

Where, however, a bankrupt, who was entitled to take out administration to the effects of an intestate, neglected to do so, but took possession of the goods and remained in possession of them for a period of twelve years, — it was held, that this was a case of reputed ownership, and that the goods passed to his assignees. (2)

Where a person entitled to administration, remains in possession several years.

## SECTION VI.

*Of Property fraudulently delivered in contemplation of Bankruptcy.* (And see as to a fraudulent or voluntary Conveyance, ante, 71. 365.)

The *voluntary* delivery, or disposal, by the bankrupt of any part of his property, in *contemplation* of bankruptcy, either to defeat the claims of his creditors generally, or to favour one in preference to others, is held to be fraudulent and void. (3) This doctrine Lord Ellenborough has designated as an excrescence upon the Bankrupt law; under which it was originally considered, that the acts of a trader only *subsequent* to his bankruptcy were strictly void (4) —

(1) *Bedford v. Woodham*, 4 Ves. 40. note (b.)

(3) B. & P. 584. 11 East, 260.

(4) 2 Camp. 168.

(2) *Fox v. Fisher*, 3 B. & A. 135.

*Property fraudulently delivered.*

the act of bankruptcy being held to draw the line of separation, between that property which might be disposed of by the bankrupt, and that which vested in the assignees. But it occurred to those who presided in the courts, that it was unjust to permit a party, on the *eve of bankruptcy*, to make a voluntary disposition of his property in favour of a particular creditor, leaving the mere husk to the rest; and, therefore, that a transfer made at such a period, and under such circumstances as evidently shewed that it was made in *contemplation* of bankruptcy, and in order to favour a particular creditor, should be void. (1)

Transfer by bankrupt, being insolvent, and without consideration, void.

In accordance with this doctrine, therefore, it is enacted by the 73d section of the new statute, that if the bankrupt, *being at the time insolvent*, shall (except on the marriage of any of his children, or for some valuable consideration) have assigned or transferred to any of his children, or any other person, any goods or chattels, or have delivered or made over any *bonds, bills, notes, or other securities*, or transferred his debts to any other person, or into any other person's name, — the commissioners may, in such case, sell and dispose of the same in the same way, as of the bankrupt's other property. (2)

As to dealings two months before commission.

But by section 81. all dealings and transactions with any bankrupt, *bonâ fide* made and entered into more than *two calendar months* before the date and issuing of the commission, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing with the bankrupt had *not* at the time *notice* of any prior act of bankruptcy.

As to gift of money to a child for his maintenance.

It was formerly held by Lord Northington, that a *gift of money* to a child, for his maintenance and subsistence in the world, could not be supported against creditors; for that no man had such a power over his own property, as to defeat his creditors in the disposition of it, unless for good

(1) 1 Star. 89.

words in italics were not in that

(2) This section is taken from statute.  
the 1 Jac. I. c. 15. s. 5., but the

consideration; and that blood had been held to be not a good consideration. (1) But in a later case Lord Eldon held, that a gift of 900*l.* to his son by a man, who three years afterwards became bankrupt (though the gift was not in consideration of marriage, or to buy him a share in a partnership), *could* be supported against creditors; and that the 1 Jac. 1. c. 15. s. 5. did not extend to a payment of money. (2) And the Court of King's Bench has, also, decided to the same effect. (3) The word *money*, it will be observed, is not comprised in the above section any more than in the statute of *James*, being confined to things only which are the subject of conveyance. And, indeed, alarming consequences would follow, if the statute was to extend to payments of money; for a son might, then, be liable to refund any portion of money given to him by his father some time before the bankruptcy, and purely with the intention of providing for his maintenance. Upon the same principle as that which governed the last two cases, it was held, also, that where one of the partners of a bank from time to time transferred sums of money, to the credit of his son's private account with the banking-house, the son was entitled to prove for the amount under a commission against the partnership. (4)

*Property fraudulently delivered.*

1000  
1000  
1000  
1000  
1000  
1000  
1000  
1000  
1000  
1000

Stock, it has been decided, comes within the description: "goods and chattels." Where the bankrupt, therefore, purchased stock in the name of his son (a minor) as a trustee for him, the stock was held to belong to the assignees. (5)

*Stock.*

Where a trader advanced to a lessee half of the fine necessary to procure a renewal of a lease, and took from him a promissory note to repay the money, unless he should by will bequeath the leasehold estate to one of the trader's children, — and the lessee bequeathed the estate

*Money advanced by a bankrupt to procure a bequest to his child.*

(1) *Partridge v. Goff*, Amb. 596.

(2) *Ex parte Shorland*, 7 Ves. 88. 384.

*Ex parte Smith*, 1 Rose, 210.

(3) *Kensington v. Chantler*, 2 M. & S. 36.

(4) *Ex parte Skirratt*, 2 Rose,

(5) *Brown v. Bellaris*, 5 Mod. 53.

*Property fraudulently delivered.*

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accordingly, but *before his death* the trader became a bankrupt, — and, after the lessee's death, the assignees filed a bill against the child of the bankrupt, claiming the money advanced, or half the estate; — Lord Thurlow held, that if it was money advanced without a lien, it might be dangerous to give it to the assignees; but that, as far as the money advanced was a lien, the father procured an interest, which must go to the assignees. (1)

What is a fraudulent preference.

With respect to what is, and what is not, considered an undue preference by the bankrupt of any particular creditor, — each case of this kind must depend upon its own peculiar circumstances; of which, perhaps, the most material is, the relative situation in which the bankrupt and the creditor stand with each other, at the time of the delivery, or transfer, of the bankrupt's property. Though the transaction may be made to assume the appearance, of a *sale* of the goods by the bankrupt to the creditor, yet if other circumstances shew that it was but a *pretended sale*, the delivery of the goods will be fraudulent and void. (2)

Delivery of goods under a pretended sale;

or an absolute sale, with an *intention* to prefer.

So, though it may amount to an *absolute sale*, yet where it appears that the *intention* of the bankrupt was to give the creditor an undue preference, the sale will, in this case, be equally void as against the assignees. (3) But where a creditor, being unable to procure payment for some barley which he had sold to the bankrupt, and suspecting him to be in bad circumstances, re-purchased the barley by a third person, and in his name, a short time before the bankruptcy — the *bankrupt not being privy* to the contrivance of the creditor — it was held, that this was no fraud against the Bankrupt law. (4)

Where not in the usual course of trade.

The delivery of the property also will be considered fraudulent, when it is not delivered in the *usual course of trade*, or of the accustomed dealing between the parties. (5) Thus,

(1) *Fryer v. Flood*, 1 Bro. 160.

(2) *Rust v. Cooper*, 2 Cowp. 629. 390.

(3) *Martin v. Pewtress*, 4 Burr. 2477.

(4) *Harris v. Lunell*, 1 B. & B.

(5) *Alderson v. Temple*, 4 Burr. 2235. 1 Bl. 441.



where a bankrupt, on the *eve of his bankruptcy*, indorsed and sent a promissory note by the post to a creditor, to whom he had never made a payment in such a manner before, and *no application* had been on this occasion made by the creditor to the bankrupt for a note, or for payment, — the transaction was held to be fraudulent and void. (1) So, where a trader in embarrassed circumstances gave his creditor a promissory note for the *whole* of his debt, in consideration of his promise to induce the *other creditors* to agree to a *composition*, each party undertaking to keep the matter a *secret* from the other creditors (2); or, where stock was transferred to a creditor who had struck a docket, in consideration of his *agreeing not to prosecute the docket*; — each of these transactions was held a fraud upon the Bankrupt law. (3) And the same, where a bankrupt had, in contemplation of absconding, inclosed certain bills to a creditor, saying, “he has the honour to *show him that preference*, which he conceives is certainly his due;” — for though the inclosure was made without the privity of the creditor, yet the express motive of the bankrupt was to give him a *preference*. (4) Where a trader also had voluntarily, *without being called upon for the money*, executed an assignment of a third part of his effects to his brother, in consideration of a previous loan of 120*l.* — though possession was delivered instantly, and several acts of ownership were exercised by the brother, who had no knowledge or suspicion of the insolvency; — yet, as the trader in two days afterwards absconded, and was declared a bankrupt, the Court held the deed void, as partial and unjust to the other creditors (5) — and as being made *in contemplation* of bankruptcy. So, where a trader (knowing himself to be insolvent) called upon his creditor and informed him of it, when the creditor said, he must nevertheless be paid his debt — which was accordingly done — and the trader immediately afterwards

*Property fraudulently delivered.*

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Where voluntary.

(1) 4 Burr. 2235.

(4) *Harman v. Fisher*, Cowp.

(2) *Wells v. Girling*, 1 B. & B. 117.

447.

(5) *Linton v. Bartlett*, 3 Wils.

(3) *Cory v. Gertchen*, 2 Mad. 40. 47. Cowp. 124.

*Property fraudulently delivered.*

became a bankrupt; — this was held to be a void transaction, — inasmuch as the circumstance, of the trader *calling upon his creditor, and disclosing to him his situation*, and then acceding directly to his request of payment, afforded strong grounds for inferring a fraudulent performance. (1) So, also, where any *voluntary payment* is made to a creditor under circumstances, that might reasonably lead the debtor to believe that his bankruptcy was *probable*, though not inevitable, — such payment will be a fraud upon the other creditors; and the money so paid may be recovered back by the assignees. (2)

*When payment not voluntary.*

But a payment is *not voluntary*, which is made by a bankrupt to a creditor, in consideration of the latter relinquishing some right he then possessed, — although the creditor may not, previously to relinquishing such right, have stipulated for any payment by the bankrupt. Thus, where a creditor who had a lien on the bankrupt's ship, received from him shortly before his bankruptcy the balance due on account of disbursements made on the ship, and then delivered up the ship's papers to the bankrupt, without having previously stipulated for payment of the balance, as a condition for the surrender of his lien, — it was held, nevertheless, that the creditor was entitled to retain this payment as against the assignees. (3) So, where the bankrupt paid his landlord five quarters' *rent*, even after an act of bankruptcy, the payment was held to be good; for the landlord had a right of distress and re-entry for the rent, and he is at liberty to waive that right if he chooses, and accept of the rent instead. (4) And in all cases, where a bankrupt has paid a creditor his debt, in the *regular course of trade*, or of *their dealings* with each other, — this is a fair advantage, which the creditor is not compellable to relinquish; for it is a transaction that might pass between any

*Rent.*

*Payment in the regular course of trade;*

(1) *Singleton v. Butler*, 2 B. & P. 283.

(2) *Poland v. Glyn*, 2 Dowl. & R. 310.

(3) *Thompson v. Beatson*, 1 Bing. 145.

(4) *Mavor v. Croome*, 1 Bing. 261. *Stevenson v. Wood*, 5 Esp. 200.

two persons, without having any thing like bankruptcy in contemplation. (1) Thus, where a bankrupt, then solvent, ordered his correspondent at Bombay to remit certain proceeds to an agent in England, who was in the habit of accepting bills for the bankrupt; though the remittance was not, in fact, made until after the act of bankruptcy, — yet, as the order was given by the bankrupt when he was solvent, and there was no fraud in the case, it was held, that the agent was entitled to retain the amount of this remittance, in satisfaction of a balance due to him from the bankrupt. (2) So, even if the transaction amounts in reality to the preference of a creditor, yet if such preference be only consequential to the contract — as, if the payment is made, or the act done, merely *in pursuance of a prior agreement* between the parties, — the creditor, in this case, will not be liable to refund to the assignees. (3)

*Property fraudulently delivered.*

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or in pursuance of a previous agreement.

Where bankers fraudulently sold out stock belonging to a customer, which stood in their names, and applied the proceeds to their own use — and afterwards, whilst they remained solvent, wrapped up certain bonds of their own in an envelope, inscribed with the customer's name, and inclosed a memorandum stating that they had deposited the bonds with him, as a collateral security for his stock, which they promised to replace — and then deposited the parcel amongst the securities belonging to other persons who dealt with them — but without giving any information of these circumstances to the customer until the evening before their bankruptcy, when they sent him the parcel with the bonds, saying, that they must stop payment the next morning; — it was held, that the customer could not under these circumstances retain the bonds against the assignees (4) of the bankers; for, though the bankers *intended* to deliver the bonds to him, he had never ACTUAL POSSESSION of them, until the very *eve of the bankruptcy*;

Contemplated appropriation of property, but not transferred until the eve of bankruptcy.

(1) Per Lord Mansfield, 4 Burr.

(3) Per Lord Mansfield, Cowp.

(2) *Jamieson v. Hodson*, 1 Star.

(4) *Wilson v. Balfour*, 2 Camp.

150. *Alley v. Hodson*, 4 Camp.

579.

525.

*Property fraudulently delivered.*

Property restored by bankrupt, which he had obtained under false pretences.

and a contemplated appropriation does not amount to an actual transfer.

But where a trader, who had obtained bills of exchange from the defendant, upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security—and on the next day (being resolved to stop payment) informed the defendant, that he had repented of what he had done, and had sent express to stop the bills, and would return them—and three days afterwards committed an act of bankruptcy—and after which he returned to the defendant all the bills (except one that had been discounted), and also two bank notes, part of the proceeds of such discount—upon which the defendant delivered back the security—and afterwards a commission issued against the trader, and his assignees then brought trover against the defendant for these bills and bank notes;—it was held, in this case, that the defendant was entitled to retain all the bills and notes so returned by the bankrupt, on the ground that the bills were originally obtained under a *false pretence* of giving a good security; and that since, under such circumstances, a court of equity would order the property to be restored, it would be useless for a court of law to permit that to be recovered, which could not be retained. (1)

*Threat or apprehension of legal process.*

So where a trader, under *a threat, or an apprehension merely, of legal process, civil or criminal—or from the pressure and importunity of his creditor*—delivers property to him, or gives him a power to receive it;—the transaction in any of these cases is not considered a fraudulent preference, even though the trader knew himself to be insolvent; for the act on his part is not a *voluntary act* (which is implied in the PREFERENCE of one creditor to another)—but one, which proceeds from the effect of fear or apprehension. (2) And

(1) *Gladstone v. Hadwen*, 1 M. & S. 517.

(2) *Thompson v. Freeman*, 1 T. R. 155. *Cosser v. Gough*, *ibid.* 156. note (c.) *Hartshorn v. Slodden*, 2 B. & P. 582. *Ex parte Scuda-*

*more*, 3 Ves. 85. *Yeates v. Grote*, 1 Ves. jr. 280. *Holbird v. Anderson*, 5 T. R. 235. *Smith v. Payne*, 6 T. R. 152. *Crosby v. Crouch*, 2 Camp. 166. 11 East, 256. *De Tastet v. Carrol*, 1 Star. 88. *Reid v. Ayton*,

even where a trader, in contemplation of bankruptcy, is intending to give a creditor a voluntary preference, but before the intention is consummated, the creditor calls and demands payment of his debt, — the payment in such a case has been held to be good. (1)

*Property fraudulently delivered.*

But where the transfer or delivery of property (upon the importunity of a creditor) *does not redeem a trader from any present difficulty*, which is the ordinary motive for such an act, when really done under the pressure of a threat; — this has been held to be *evidence* that the transfer was *not made* under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy. Thus, where a trader, upon being pressed by a creditor for payment or security (one or other of which he said he *would have*) gave a bill of sale of what was apparently the *whole of his stock*, and immediately afterwards left his business and home, and became a bankrupt; — this transaction, notwithstanding the pressure, was held void as against the assignees. (2)

Where transfer does not redeem bankrupt from any present difficulty.

But even a *voluntary transfer* of property, made by a trader in a situation of impending bankruptcy, will not be void, if made *bonâ fide*, and not from any motive of undue preference. As, in a case, where certain traders ordered goods of a manufacturer to be sent to their agents to be shipped — and after the goods were delivered to such agents, (the traders having stopped payment) the manufacturer got possession of the goods, by indemnifying the agents for delivering them up to him: the traders called a meeting of their creditors, and were encouraged by the result of such meeting, as well as by legal advice, to give up all claim to the goods to the manufacturer, which they accordingly did the latter end of July, but did not commit an act of bankruptcy until the 26th of September; and the

Voluntary transfer good, if not from motive of undue preference.

1 Holt, N. P. Rep. 503. *Arbousin v. Hambury*, *ibid.* 575.

(2) *Thornton v. Hargreaves*, 7 East, 544.

(1) *Bayley v. Ballard*, 1 Camp. 416.

*Property fraudulently delivered.*

Or merely contemplating that his trade must cease, without contemplating bankruptcy.

Or in contemplation of an intended deed of composition.

Property given up by agreement, at a meeting of creditors.

Court held that the above circumstances were evidence for a jury to find, that the goods were given up *bonâ fide*, and not from any wish to give an undue preference. (1)

So, though a trader may *contemplate that his trade must cease*, and that he cannot pay his creditors unless they give him time, it does not necessarily follow, that he contemplates bankruptcy. Thus, where B. had purchased goods on October 8th, for the purpose of exportation; but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them to the seller on October 16th:—on the 17th he stopped payment, but, expecting remittances from abroad more than sufficient to pay his debts, he had no doubt but that his creditors would give him time, which they, however, refused, and a commission issued against him the 2d November;—It was held, that under these facts the jury were warranted in finding, that the re-delivery of the goods to the seller was not made in *contemplation of bankruptcy*. (2) So also, where a preference is given by a trader, in *contemplation of an intended deed of composition*,—though it would have been fraudulent as against the creditors under that deed, if it had been carried into effect—yet, as a commission of bankruptcy did not issue until four months afterwards, this was held to be not a preference in contemplation of bankruptcy; for *no commission* was, in fact, *contemplated* at the time the preference was given. (3) And where a merchant in London received bills of exchange from his correspondent at Amsterdam, to whom he was indebted beyond the amount of the bills; and after stopping payment, called a meeting of his creditors on the 7th January, when it was agreed that the bills should be delivered to an agent in London of the creditors at Amsterdam, in order to receive the money and hold it for the

(1) *Dixon v. Baldwin*, 5 East, 175.

(2) *Fidgeon v. Sharp*, 1 Marsh, 196. 5 Taunt. 539.

(3) *Wheelerwright v. Jackson*, 5 Taunt. 109.

persons who might be ultimately entitled to it: the bills, however, had been previously delivered by the merchant to such agent, for the use and on the account of the creditor at Amsterdam, and the agent received payment of the bills, as they respectively became due: the act of bankruptcy was not committed till October following, when a commission issued against the merchant:—under these circumstances, Lord Ellenborough held, that the assignees could not maintain an action against the agent for the amount of the bills; as they were deposited with him for the use and benefit of the creditor, and the bankrupt might, at the time of the deposit, have himself directly returned them to Amsterdam. (1)

Stoppage in transitu.

## SECTION VII.

*Of the Effect of the Assignment upon Goods in transitu, — and herein of the Right of Stoppage.*

The assignment of the commissioners does not pass any property to the assignees in goods consigned to the bankrupt, which may be stopped *in transitu*, — whether such goods are consigned to the bankrupt himself, or whether he obtains possession of them *in their transit* to the hands of the regular consignee.

The right of stoppage *in transitu* is a privilege, which the law affords to every vendor who has *not been paid* for goods, in order to protect himself against the insolvency of the vendee. Though forming part of the general law of merchants (2), it seems with us in England to have been first established in the Court of Chancery, as a kind of

Nature of the right of stoppage in transitu.

(1) *Graff v. Greffulhe*, 1 Camp. 89.

(2) *Robinson's Adm. Rep.* 325. In Russia and in France, if a seller can merely identify the property, though it may be in the actual pos-

session of an insolvent vendee, he is entitled to have it back again; (1 *Bast*, 515. *Abbott on Shipping*, 335. et seq.) and this was also the rule of the ancient civil law, *Dig.* 18. 1. 19.

**Stoppage  
in transitu.**

Can only  
be exer-  
cised,  
when  
vendee  
proves  
insolvent.

equitable lien (1); and to have been afterwards adopted by the courts of common law, for the purposes of substantial justice, and to prevent the debts of one man being paid with the effects of another. (2) But, from whatever source it sprung, it is a right now universally recognized in all cases between an *unpaid* vendor of goods and the vendee; so much so, indeed, that Lord Hardwicke once observed in a matter of this kind, that if the assignor could get his goods back again by any means, provided he did *not steal them*, he would not blame him. (3) As between the vendor and vendee, however, the right does not (strictly speaking) exist, unless the vendee prove insolvent; for if a vendor, from misinformation, or excess of caution, assumes this privilege during the vendee's solvency, he assumes a right which does not belong to him; and the vendee would, in such case, be entitled not only to the delivery of the goods, but also to indemnity from the vendor for the expenses incurred in obtaining possession (4) of them. But it is not necessary, that the vendee should be *actually insolvent* at the time the goods are stopped; for if he *proves* to be so before the ordinary time, when they would have reached their destination, the vendor will in that case have been justified in the exercise of this right, and to the benefit of his own provisional (5) caution.

In the multifarious changes of ownership, however, which merchandise is occasionally subject to in its transit from one trader to another, questions of difficulty will frequently occur between the *consignor and third persons*,—when the consignee assigns for a valuable consideration the bill of lading

(1) *Wiseman v. Vandeput*, 2 Vern. 203. *Snee v. Prescott*, 1 Atk. 245. *D'Aquila v. Lambert*, Amb. 399. 2 Eden. Rep. 75.

(2) 7 T.R. 445.

(3) *Snee v. Prescott*, 1 Atk. 250. Lord Kenyon said, (3 T.R. 467.) that the doctrine of stopping goods *in transitu* was bottomed on *Snee v. Prescott*, on which all the other

cases were founded; but the right was recognized in *Wiseman v. Vandeput*, 2 Vern. 203., long before the case of *Snee v. Prescott* occurred.

(4) Per Sir W. Scott, 6 Rob. Adm. Rep., case of *The Constantia*; and see *Ellis v. Hunt*, 3 T.R. 469.

(5) *Ibid.*



of the goods transmitted to him by the consignor, and without notice (on the part of such third persons) that the goods have not been paid for by the consignee. It is proposed, therefore, to consider the right of stoppage *in transitu* under two divisions: *first*, as it relates to questions simply between the *consignor and consignee*, where there has been no resale, or alienation, of the goods by the consignee; and, *secondly*, as to questions between the *consignor and third persons*, where there has been such resale or alienation.

*Stoppage  
in transitu.*

Division  
of the sub-  
ject.

And, *first*, as to questions between the *consignor and consignee*, where there has been *no resale, or alienation* by the consignee.

Questions  
between  
*consignor  
and con-  
signee.*

All goods not paid for by a consignee, may be stopped by the consignor in any period of their transit, ere they reach the hands of the consignee (1), whether delivered to a *wharfinger* (2), a *carrier*, an *innkeeper* (3), a *master of a vessel* (4), or in fact to any other person, either to forward, or to carry and deliver to the consignee. And even when goods are delivered to a *common carrier*, or on board a *general ship*, at the request and appointment, and in the *name of the consignee*, and at his risk and expense; the consignor is nevertheless entitled, if the consignee become insolvent before the goods arrive, to stop them *in transitu*. (5) For a delivery of this nature to a carrier, or master of a ship, being made merely for the purpose of forwarding the goods to their destination, is only a *constructive*, and not an *actual* delivery to the consignee; and, though in cases as between buyer and seller, if no bankruptcy or insolvency happen, the goods in such a case may be considered in the possession of the buyer the instant

When de-  
livered to  
a *common  
carrier*, or  
on board a  
*general  
ship*, may  
be stopped.

(1) *Wiseman v. Vandeput*, 2 Vern. 203. Ex parte *Clare*, 1 C. B. L. 383. *Snee v. Prescott*, 1 Atk. 245. *Northey v. Field*, 2 Esp. 615. *Birkett v. Jenkins*, cit. Cowp. 295.

(2) *Mills v. Ball*, 2 B. & P. 457.

(3) *Hunter v. Beal*, cit. 3 T. R. 466.

(4) *D'Aquila v. Lambert*, Amb. 399. 2 Eden, 75. 1 C. B. L. 382. Ex parte *Wilkinson*, cit. Amb. 400. Ex parte *Walker*, 1 C. B. L. 394.

(5) *Walley v. Montgomery*, 3 East, 585.

*Stoppage  
in transitu.*

So to a  
packer or  
wharf-  
finger.

So plate  
delivered  
to an en-  
graver.

Contrà,  
when  
buyer uses  
warehouse  
of the  
carrier,  
&c. as his  
own.

Or where  
there is a

they go out of the possession of the vendor; yet, in the event of the *bankruptcy of the vendee*, an *actual delivery* is necessary to divest the vendor's right of stopping the goods *in transitu*. (1) And the same, when the goods are delivered to a *packer*, or *wharfinger*, at the request of the consignee, to be forwarded to their place of ultimate destination; for, in such a case, the *packer*, or *wharfinger*, is considered merely as a *middle man*, and only one of the hands by which the goods are to be forwarded. (2) So, where A. agreed to buy some articles of *plate* of B., who was to get A.'s arms engraved upon them, and to pay for the engraving; it was held, that a delivery to the *engraver* for that purpose, was not a delivery to A., so as to defeat B.'s right of stopping the plate *in transitu*. (3)

But, where the buyer of goods has *no warehouse of his own* to receive them, except that of a *packer*, or a *wharfinger*, and is in the habit of using their warehouse as the general repository of his goods, the *transitus* in this case will be at an end, when the goods arrive at such warehouse; for the *packer and wharfinger* are then considered as the *private agents* of the buyer, and their possession as that of the buyer himself. (4) And so, where a trader in London, having *no warehouse of his own*, was accustomed to purchase goods at Manchester, and export them to the continent; and the goods after their arrival in London remained in the *waggon-office of the carriers*, until they were removed by the trader for the purpose of being shipped;—it was held, under these circumstances, that the *transitus* of the goods was at an end on their arrival at the *waggon-office*. (5)

It was said indeed by Lord Mansfield, that goods re-

(1) Per Buller J. *Ellis v. Hunt*, 3 T.R. 469. Per Lord Hardwicke, 1 Atk. 248. *Stokes v. La Riviere*, cit. 3 T.R. 466.

(2) *Mills v. Ball*, 2 Bos. & P. 457. *Hunt v. Ward*, cit. 3 T.R. 467.

(3) *Owenson v. Morse*, 7 T.R. 64.

(4) *Scott v. Pettit*, 3 Bos. & P. 469. *Richardson v. Goss*, ibid. 127. Per Chambre J. *Leeds v. Wright*, ibid. 320.

(5) *Rowe v. Pickford*, 1 Moore, 526. 8 Taunt. 83.

mained *in transitu*, until they came to the *corporal touch* of the vendee. (1) But this is merely a figurative expression, and has never been literally adhered to. (2) For, where the goods are bulky, there may be a symbolical delivery of them, without any change of place, or without the vendee even seeing them — such as a delivery of the *key* of the warehouse (3) where they are deposited — or by the transfer of any other *indicia* of property, — of West India Dock warrants, for instance, where the goods are lying in the company's warehouses. (4) In such cases it is quite sufficient, if the goods come *virtually* into the possession of the vendee, and he has exercised over them some act of ownership. (5)

Stoppage  
in transitu.

symbolical  
delivery.

Where goods were consigned to a bankrupt in the country, and as soon as they arrived at the inn there, his assignee went and put his *mark* upon them, but did not take them away ; — it was held, nevertheless, that the consignor could not afterwards stop them, as this was a sufficient taking possession of them, so as to prevent their being considered any longer *in transitu*. (6) A vendor, however, does not lose his right, by the consignee merely making a *prior claim* to the goods ; for there must be either a *delivery*, or some *taking of possession* by the vendee, in order to divest the vendor effectually of his right to stop them. (7) And the *payment of freight* for the goods by the consignee, or his agent, appears not, of itself, to be a sufficient taking of possession, so as to deprive the consignor of his right of stoppage. (8)

Where  
consignee  
puts his  
mark on  
the goods.

Payment  
of freight.

But in all cases, where the goods are delivered by the vendor to a *particular agent*, appointed by the vendee, with-

Delivery  
to ven-  
dee's  
agent.

(1) *Hunter v. Beal*, cit. 3 T.R. 466. *Samuda*, 1 Holt. 395.; and see 6 G. 4. c. 94. s. 2.

(2) Per Lord K. 3 T.R. 468.

(5) *Wright v. Lawes*, 4 Esp. 82.

(3) Per Lord Ellenborough, 12 East, 618. Per Lord K. 1 East, 192.

(6) *Ellis v. Hunt*, 3 T.R. 464.

(4) *Keyser v. Suse*, Gow. N.P.C. 58. *Lucas v. Dorrien*, 7 Taunt. 276. 1 Moore, 29. *Zwinger v.*

(7) 1 Atk. 245. Amb. 399. 2 B. & P. 457.

(8) *Mills v. Ball*, 2 B. & P. 457.

*Kinlock v. Craig*, 3 T.R. 119.

Stoppage  
in transitu.

out being subject to any *ulterior destination*, and remain entirely under the vendee's control, the right of the vendor to stop *in transitu* is at an end. (1)

Where  
vendor  
gives a  
delivery  
note on  
wharf-  
finger, and  
nothing  
remains to  
be done.

So, if goods at the time of the sale are in the hands of a wharfinger, (though not appointed by the vendee, but having been previously deposited with him by the vendor) and the vendor delivers a note to the vendee, ordering the wharfinger to deliver the goods to him; and the wharfinger receives the note, and *nothing remains to be done by the vendor* in order to complete the sale; — the wharfinger is, in this case, bound to hold the goods as the agent of the vendee, and the vendor cannot countermand the order for delivery; nor is a transfer in the wharfinger's book, as we have before seen (2), necessary to complete the delivery. (3)

Where  
something  
does re-  
main to be  
done.

But in all cases, where any material acts (previous to the delivery of goods) remain to be done by the vendor, or the wharfinger — such as the *weighing*, or *measuring*, of the goods, or the *separation* of the quantity sold from the general bulk, — the order for delivery may in that case be countermanded (4), though it is even actually entered in the

(1) *Dixon v. Baldwin*, 5 East, 175.

(2) Ante, 412.

(3) *Harman v. Anderson*, 2 Camp. 243. *Whitehouse v. Frost*, 12 East, 614.

(4) *Wallace v. Breeds*, 13 East, 522. *Hanson v. Meyer*, 6 East, 614. *Hawes v. Watson*, 2 B. & C. 548. *Rugg v. Minett*, 11 East, 210. *Austin v. Craven*, 4 Taunt. 644. *White v. Wilks*, 5 Taunt. 176. 1 Marsh. 2. *Zagury v. Furnell*, 2 Camp. 240. It is impossible to reconcile the case of *White v. Wilks* with that of *Whitehouse v. Frost*, supra; the latter case deciding, that the delivery of a quantity of oil was complete, though the oil sold had not been actually separated from a larger quantity belonging to the vendor; — and the former, that such previous separa-

tion was absolutely necessary, before the delivery could be considered perfect. It was observed by Sir J. Mansfield C.J., that the difficulty was much greater in holding a commodity in a *liquid* state to be delivered, when not separated from the general mass, — than where the goods are of a *solid* substance. And the case of *Whitehouse v. Frost* was, as to this particular point, much questioned by the judges in *Austen v. Craven*, 4 Taunt. 644. Upon the whole, the better opinion seems to be, that wherever goods are in a general mass, whether in a solid, or a liquid state, a *separation* of the quantity sold is indispensable, to prevent the vendor's right to countermand the order, and stop the delivery.

wharfinger's books, and the goods transferred into the name of the purchaser. (1) *Stoppage in transitu.*

It has been decided in one case, that though goods are permitted to remain in the warehouse of the vendor, yet, if he *receives warehouse rent* for them, this amounts to such a delivery, as prevents the vendor's right of stoppage *in transitu* (2); though this circumstance alone would not, if the vendor become bankrupt, prevent his assignees from substantiating a claim, founded on the principle of *reputed ownership*. (3) Where vendor receives rent for goods not taken away.

A delivery of *part* of a consignment of goods to the consignee, in general, puts an end to the *transitus* of the whole. (4) But where a carrier landed a *part* of the goods on the vendee's wharf; and then, finding that the vendee had stopped payment, reloaded the same on board his own barge, and took the whole of the goods to his own premises, — it was held, that this did not amount to a delivery of the goods, so as to divest the consignor of his right to stop *in transitu*; for the *special property* remained in the carrier, after such part delivery, *until the freight was paid* — or until he had done some act to shew, that he *assented* to part with the possession of the goods, without receiving his freight. (5) Delivery of part of goods.

Where goods are delivered on board a ship in the actual possession of the vendee — that is, one which is let to him for a certain period, and over which he has the entire management and control (6); — or if goods are delivered to the vendee at a wharf, and are afterwards shipped by him (7); — the vendor has then in neither case a right to stop them *in transitu*. But this rule may be controlled in Delivery on board a ship in possession of vendee.

(1) *Shepley v. Davis*, 1 Marsh. 504. *Hammond v. Anderson*, 1 N.R. 252. *Busk v. Davis*, 2 M. & S. 69.

(2) *Hurry v. Mangles*, 1 Camp. 452.; but see per Heath J. 5 Taunt. 179. (5) *Crawshay v. Eames*, 1 B. & C. 181.

(6) *Fowler v. Kymer*, cit. 7 T. R. 440. 1 East, 522. 3 East, 396.

(7) *Noble v. Adams*, 7 Taunt. 59.

(3) See ante, 410. et seq.

(4) *Stubey v. Hayward*, 2 H. B.

Stoppage  
in transitu.

Where  
vendee has  
no actual  
control  
over the  
ship.

Where a  
specific  
pledge of  
cargo.

some measure by the laws of a foreign state, upon a transaction taking place within the foreign jurisdiction: as, where goods were put on board a ship in a port of Russia, and the consignors (who are by the law of that country entitled to sue out process, and retake their goods on board any ship, and retain them till they are paid for,) applied to the captain of the ship to sign the bills of lading to their order (which he complied with) without the necessity of suing out process; — this was held to be a substantial compliance with the Russian law on the part of the captain; and that he was consequently bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt. (1) And where the vendee has no control over the ship, but merely enters into an agreement with the master, for the ship to go to a particular port, and there receive goods on his account, — the delivery of goods on board a ship, under these circumstances, is not a delivery to the vendee; but the goods may be stopped *in transitu*, as they might on board a *general* ship, without reference to the laws of any foreign state. (2)

But where there is a *specific pledge* of a cargo, by express agreement between the parties, accompanied with an indorsement and delivery of the bill of lading by the consignor to the consignee, — then, after the goods are once put on board the ship by the consignor, it seems that he has afterwards no right to stop them *in transitu*. Thus, where a merchant at Liverpool, desiring an extension of credit upon a banking-house in London, agreed (among other securities) to consign certain goods to a mercantile house in London, consisting of the same partners as the banking-house, though under a different firm — and accordingly remitted the invoice of a cargo, and the bill of lading indorsed in blank, to the mercantile house — but the cargo was prevented from leaving Liverpool by an embargo, and

(1) *Inglis v. Usherwood*, 1 East, 515.

(2) *Bohtlinck v. Inglis*, 3 East, 381.

the consignor then became bankrupt; considerably indebted to the bankers;—it was held, that these circumstances amounted to an actual transfer of the goods by the consignor to the consignee; and that, upon the delivery on board the ship, they became vested in the consignee. (1) So, where C. advanced money to A., on an express agreement from A., that the proceeds of a cargo of fish (which A. had consigned to B. for sale) should be remitted to C., in order that they might constitute a security for the money advanced by C.;—it was held, that this was an appropriation of the proceeds of the cargo; which A. could not rescind, by afterwards writing to B., that the cargo was not to be responsible for any advances made by C.;—for his engagement with C. was not like a mere order for payment of money, which might be revoked by a subsequent countermand before payment;—and that B., under these circumstances, was justified (as against A.'s assignees) in remitting the proceeds to C. (2)

*Stoppage  
in transitu.*

---

Though the consignor has a right to stop the goods at any time before they reach their journey's end, yet it has been said, that if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage. (3) But in a case, where upon the arrival of a ship at her port of discharge, the assignees of the consignee (who had become bankrupt) took possession of the cargo, and the ship was afterwards obliged to perform quarantine, during which the cargo was claimed by the consignor,—it was ruled by Lord Kenyon, and his opinion was afterwards approved of by the Court of King's Bench, that the consignor had a right to stop the goods, as the ship had *not completed her voyage* until quarantine was performed. And he is reported to have added, that if a consignee had a right to go out to sea

As to vendee's right to take possession of goods before voyage completed.

(1) *Haille v. Smith*, 1 B. & P. 563.; and see *Vertue v. Jewell*, 4 Camp. 31.

(2) *Fisher v. Miller*, 1 Bing. 150.

(3) Per Lord Alvanley, 2 B. & P. 461.

**Stoppage  
in transitu.**  

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Where  
vendee has  
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Stoppage  
in transitu.

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**Stoppage  
in transitu.**

to meet the ship, in order to take possession of goods on board her *before the termination* of her voyage, it would go the length of saying, that he might meet the ship coming out of the port *from whence* she had been consigned, and thus immediately divest the property out of the consignor, and vest it in himself — a position which of course could never be supported, as there would then be no possibility of stoppage *in transitu* at all. (1) There may, however, be a distinction between carriage *by sea*, and carriage *by land* upon this point; for, in the former case, the master of the ship, by signing the bill of lading, *agrees with the consignor* to deliver the goods *at the destined port*; which therefore gives no authority to the consignee to demand them before their arrival (2); — whereas, in the latter case, no such express agreement is entered into between the consignor and the carrier.

Right of  
stoppage  
not de-  
feated,  
when.

The vendor is entitled to stop the goods in every part of their transit to the place of their destination; and, therefore, his merely handing over the shipping note and delivery order to the wharfinger before their arrival, was held not to transfer the property so entirely as to defeat his right to stop the goods, by an order to that effect given to the wharfinger two days before their arrival. (3) And the right may be exercised also, without taking actual possession of the goods; — for a claim made by the consignor upon the carrier, or middle man, is sufficient for that purpose. (4) And if a carrier, after notice from the vendor to stop the goods *in transitu*, deliver them to the vendee by *mistake*, — the sale to the vendee is nevertheless rescinded; and the vendor may bring trover for them against the vendee. (5)

May be  
exercised  
without  
taking ac-  
tual pos-  
session.  
Delivery  
by mis-  
take.

Vendor  
cannot ob-  
tain an in-  
junction  
to stop.

A court of equity, it seems, will not assume a jurisdiction to stop *in transitu*, notwithstanding the right is recognized in the vendor; and, therefore, an injunction was refused

(1) *Holst v. Pownall*, 1 Esp. 240.  
(2) *Abbott on Shipping*, 388.  
(3) *Ackerman v. Humphrey*, Carr.  
N. P. Rep. 53.

(4) *Holst v. Pownall*, 1 Esp. 240.  
*Northey v. Field*, 2 Esp. 613.  
(5) *Litt v. Cowley*, 7 Taunt. 169.;  
but see *Cors v. Handen*, 4 East,  
211.

to restrain the sailing of a vessel, which contained goods sold to a person who had become insolvent, though the vendor retained his right to stop *in transitu*. (1)

*Stoppage  
in transitu.*

The consignor may expressly reserve to himself, the right of determining *when* he will part with all control over the goods consigned, so as to abandon any further right to stop them *in transitu*. Therefore, where the master of a ship, on board of which the goods were laden, gave a receipt for them to the vendor — which receipt it was the practice to exchange afterwards with the master for the bill of lading, the holder of the receipt being considered as the person alone entitled to the bill of lading, and the receipt keeping full control over the goods till given up; — it was held, that though the vendee had got possession of a bill of lading of the goods, which had been improperly obtained from the master without the consent of the vendor, yet that the vendor, continuing in possession of the receipt, was entitled to stop the goods *in transitu*. (2) And so, even where the receipt for the goods had been merely demanded of the master, and which was refused to be signed by him at the time of the delivery on board; — for the delivery was *not perfect and complete*, until that receipt was given. (3)

Consignor  
may re-  
serve when  
his right  
of stop-  
page shall  
cease.

If goods consigned are lodged in the king's stores, on account of the duties not being paid, the consignor may stop them, if he claim them before they are actually sold for the payment of the duties; or if sold, he is entitled to the proceeds after payment of the duties. (4)

Goods in  
the king's  
ware-  
house.

A payment by the consignee, of *part* only of the purchase money, does not bar the right of the consignor to stop the goods *in transitu*. (5) Neither is the consignor barred, where the consignee has accepted bills (which are afterwards dishonoured) on the credit of the consignment; for there is a

Payment  
of *part*, or  
acceptance  
of bill dis-  
honoured.

(1) *Goodhart v. Lowe*, 2 J. & W. 349.

(3) *Ruck v. Hatfield*, 5 B. & A. 632.

(2) *Craven v. Ryder*, 6 Taunt. 433. 1 Holt, 100. 2 Marsh. 127

(4) *Northey v. Field*, 2 Esp. 613.

(5) *Hodgson v. Loy*, 7 T.R. 440.

*Stoppage  
in transitu.*

When acceptance equivalent to payment.

When a transaction is in effect a sale.

A vendor, or consignor, only can stop.

A lien does not give the right.

great difference between *actual payment*, and a *liability to pay*. (1) But it has been ruled by Lord Ellenborough at *Nisi Prius*, that unless the vendee's acceptance is proved to have been *dishonoured*, the consignor has no right to stop *in transitu*; for he then stands in the situation of a paid seller. (2) And this is consistent with what Lord Chief Justice Abbott lays down in *Sowerby v. Brooks*, viz. that the acceptance of a bill, which is afterwards duly paid, is equivalent to a payment at the time of the acceptance. (3)

But though questions, as to the right of stoppage *in transitu*, generally occur between a vendor and vendee, yet the right also extends to cases where the contract between the parties is *in effect* a sale, and the consignor is substantially the vendor of the goods. Thus, where a trader here gives an order to his correspondent abroad, to procure and ship for him certain goods, — which the latter procures *upon his own credit*, without naming the trader here, and ships to him at the original price, charging only his commission; — the correspondent abroad is so far a vendor, as between him and the consignee, that on the bankruptcy of the latter, he may stop the goods *in transitu*. (4) But, where a trader here ordered a correspondent abroad to ship him goods, for the amount of which his agent there accepted bills upon receiving a commission; and the agent also transmitted to the trader the bills of lading which he had *received from the trader's correspondent*; — it was held, that the agent could not stop the goods *in transitu*, as he was no more than a surety for the price, and neither vendor, nor consignor. (5)

A mere *lien*, however, upon goods does not give the consignor the same right to stop *in transitu*, as the right of property in them does. Therefore, if a man has a lien

(1) *Feise v. Wray*, 3 East, 93.  
*Kinloch v. Craig*, 3 T.R. 122. 783.

(2) *Davis v. Reynolds*, 1 Star.  
115.

(3) 4 B. & A. 525.; and see  
*Hawkins v. Penfold*, 2 Ves. 550.

(4) *Feise v. Wray*, 3 East, 93.

(5) *Siffken v. Wray*, 6 East, 571.

upon goods for work done to them, and he afterwards delivers them to a carrier, to be conveyed on account and at the risk of his principal, he cannot recover his lien by stopping the goods *in transitu*, and procuring them to be re-delivered to him. (1)

*Stoppage  
in transitu.*

When a party remits money on a *particular account*, or for a *particular purpose*, it may be stopped *in transitu*; but not, where it is a *general remittance* from a debtor to his creditor on account of his debt. (2)

When money may be stopped.

The consignor of goods for sale, on the *joint account* of himself and the consignee, may stop them *in transitu*. (3)

Where consignee jointly interested.

So, where the sale is to a party trading under a licence with an hostile country, a vendor, though an alien enemy, is entitled to stop; for the licence gives to *both parties* the benefit of the contract. (4)

Where vendor an alien enemy.

As a vendor, who is paid for the goods, cannot stop them *in transitu*, as against the person to whom he sold them, — so neither can he exercise this right, on the insolvency of a *subsequent vendee*. Thus, where A. sold goods to B., (which were then entered in A.'s name in the books of the West India Dock Company) and indorsed and delivered the dock-warrant to B.; who afterwards sold the goods to C. on credit, and delivered to him the dock warrant; — it was held, that A. could not, on C.'s insolvency, lawfully take possession of the goods, though they continued to stand in A.'s name, and the warrant had never been lodged with the company. (5)

A paid vendor cannot stop against a subsequent vendee.

A vendor is not deprived of his right of stoppage, by any *usage among carriers* to retain goods as a security for the general balance due to them from the vendee; and may reclaim the goods out of the carrier's hands, upon payment of the price only of the carriage of the particular parcel of goods consigned. (6) Neither is a vendee, who has paid

Vendor not deprived of his right by usage of carriers.

(1) *Sweet v. Pym*, 1 East, 4.

(5) *Spear v. Travers*, 4 Camp.

(2) *Smith v. Bowles*, 1 Esp. 578.

251.; and see 6 G. 4. c. 94. s. 2.,

(3) *Newsom v. Thornton*, 6 East,

and post. 462.

17.

(6) *Oppenheim v. Russell*, 3 B.

(4) *Fenton v. Pearson*, 15 East,

& P. 42.

*Stoppage  
in transitu.*

the price of the goods to the vendor, deprived of his right to receive them from the carrier, by a similar usage as between the carrier and the vendor. (1)

Right as  
between  
consignor  
and third  
persons.

2dly, As to questions between the *consignor and third persons*, where there has been a resale, or alienation of the goods by the consignee.

The right of a consignor to stop *in transitu* — where there has been a resale or alienation of the goods by the vendee, or consignee, before their arrival or complete delivery to him — until very lately, depended mainly upon the question, whether the third person claiming under such resale or alienation, had, or had not, *notice*, that the consignor had *never received payment or value* for the goods; and also upon the acts of the consignor himself, in so far as they amounted either to a preservation of his right of stoppage *in transitu* — or to an abandonment of it, by his assenting to a perfect delivery or transfer of the goods, whether to a first or a second vendee.

Holder of  
bill of lading to be  
deemed  
the true  
owner, unless notice  
to the contrary.

But the law in this respect has undergone a material alteration by two recent acts of parliament (the 4 G. 4. c. 83., and 6 G. 4. c. 94.) — by the last of which (2) (sect. 2.) it is enacted, that where any person is entrusted with any *bill of lading*, or other mercantile document for delivery of goods, he shall be deemed the true owner of the goods, so far as to give validity to any contract made by such person for the sale or disposition of them, or for the deposit or pledge thereof, as a security for advances made on the faith of any of such documents; — provided the person making such advances has no notice, by any of such documents, or otherwise, that the person entrusted therewith is not the actual and *bonâ fide* owner. (3) But no person (4), who takes the goods in *deposit* or *pledge*, for a debt pre-

(1) *Butler v. Woolcot*, 2 N.R. 64.

(2) The 6 G. 4. incorporates all the provisions of the 4 G. 4.; and see post. "Lien."

(3) And see section 4.

(4) Section 3.

viously due, can acquire any further right, than that of the person entrusted with such goods or documents.

*Stoppage  
in transitu.*

By section 4., also, any person may contract with any agent entrusted with goods, or to whom goods are consigned, for the *purchase* of them; and may receive the same of, and pay for the same to such agent; and such contract will be binding upon the owner, notwithstanding the buyer has notice that the seller is only an agent; — provided the contract be made in the usual and ordinary course of business, and that the buyer, at the time of purchase or of payment, had no notice that such agent was not authorised to sell the goods.

Sale by an agent valid, unless purchaser has notice that the agent is not authorized to sell.

It becomes important, therefore, to inquire how far these new enactments interfere with former cases, which involve the right of stoppage *in transitu* as it affects *third persons*, — and which have been hitherto regarded as the landmarks of the law, when a question of this nature has been brought before the courts.

It was formerly decided by Lord Hardwicke (1), that, though a consignee of goods *assigned* the bill of lading (2) to a third person for a valuable consideration, the consignor was, nevertheless, *under any circumstances* previous to the arrival of the goods, entitled to stop them *in transitu*. But this decision has long ceased to be an authority on this particular point, and was first shaken by the opinions of the Judges in *Lickbarrow v. Mason*. (3) As this last-mentioned case, which was carried through a protracted course of litigation, has been hitherto the leading one upon this branch of the subject, it may not be amiss to give some account of it; though the point which was originally determined by it, and which was afterwards

As to right of consignor, when consignee assigns the bill of lading.

*Lickbarrow v. Mason.*

(1) *Snee v. Prescott*, 1 Atk. 245.

(2) The first case in the books, that recognized the *right* of the consignee to assign the bill of lading, is *Evans v. Marlett*, 1 Lord Raymond, 271. 12 Mod. 156. 3 Salk. 290.; which was followed by *Appleby v. Pollock*, mentioned in Abbott on Shipping, 344. But the

legal effect of the assignment, as between the consignor and the assignee, does not appear to have been considered before *Snee v. Prescott*, and *Wright v. Campbell*, 4 Burr. 204 b.

(3) 2 T.R. 63. 6 East, 20. in note.

*Stoppage  
in transitu.*

contested by two different writs of error, never received a *final* decision.

When the case first came before the Court of King's Bench, it was held, that the right of the consignor to stop the *goods in transitu* was *divested*, by the consignee assigning the bill of lading to a third person for a valuable consideration, *without notice* on the part of such third person that the goods were not paid for; — and that there was no distinction, in this respect, between a bill of lading indorsed in blank, and an indorsement to a particular person. This judgment of the King's Bench was afterwards reversed, on a writ of error in the Exchequer Chamber; upon which occasion, the opinion of the Court was expressed by Lord Loughborough in a very elaborate judgment.(1) The record was then removed into the House of Lords, where the judgment given in the Exchequer Chamber was reversed, and a *venire facias de novo* (2) was awarded. A new trial accordingly took place; — when the jury found a special verdict, stating the same facts as had been given in evidence on the former trial; and finding also, that by the custom of merchants, bills of lading were (before the ship's arrival) *negotiable*, or transferable, by the shipper of the goods to any other person — by the shipper indorsing the bill of lading, and delivering or transmitting to him the same so indorsed; and that, by such indorsement and delivery, the property in the goods was wholly transferred; and also, that indorsements of bills of lading *in blank* might be filled up by the person (to whom they were so delivered) with words ordering the delivery of the goods to be made to himself; and that the same, when so filled up, had the same operation, as if it had been done by the shipper, when he indorsed (3) the bill of lading. The Court, upon this

A bill of lading negotiable by indorsement.

As to indorsement in blank.

(1) 1 H. B. 357.

(2) 4 Bro. Parl. Ca. 57.

(3) If the bill of lading has been indorsed by the consignor, it seems, that a second indorsement by the

consignee is not necessary to perfect the transaction between him and the third person. Abbott on Shipping, 399.



occasion, declined entering into a discussion of the case, as it was intended to carry it again to the House of Lords, — merely saying, that they still retained their former opinion. (1)

Stoppage  
in transitu.

It does not appear, however, that the case was afterwards taken up to the House of Lords; — but the doctrine, as laid down by the Court of King's Bench in the first decision of it, has been since recognised in subsequent cases involving a similar question. By these cases the following distinction has been established, viz. wherever a bill of lading is indorsed *with notice* to the indorsee, that the goods *have not been paid for* — or where the indorsee has *notice of the insolvency* of the consignee — the indorsee then takes the bill of lading, subject to the same rights as the original consignee; — and, therefore, the consignor is entitled to stop the goods *in transitu*. (2)

When  
indorsed  
*with notice*  
that goods  
have not  
been paid  
for.

This rule, however, as to *notice*, appears to have been extended in some degree, and not to be confined to *money payments*; for the expression, that occurs in the opinions of the Judges in the cases where the rule was first laid down, viz. “without notice that the goods *have not been paid for*,” it has been since determined, is not to be understood in a restricted sense — but as conveying the meaning of “without notice of such circumstances, as would prevent the bill of lading from being *fairly and honestly assignable*.” — Accordingly, where goods were consigned, payable for by the consignee in a bill at three months — and after the consignee had accepted such bill, and before it was due, he assigned the bill of lading to another person *bonâ fide* for a valuable consideration, — it was held, that though such person knew at the time that the consignor had not received *actual payment in money* for the goods, yet that, after such assignment, the consignor could not stop the goods *in transitu*; for, if the indorsee of the bill of lading had known all the circumstances of the case, as they stood between

Rule as to  
notice, not  
confined  
to *money*  
*payments*.

(1) 5 T. R. 683.

31. *Newsom v. Thornton*, 6 East,

(2) *Salomons v. Nissen*, 2 T. R. 17.; and see *Wright v. Campbell*, 674. *Vertue v. Jewell*, 4 Camp. 4 Burr. 2046.

*Stoppage  
in transitu.*

the consignor and consignee, it was considered, that he would have known nothing which would have made it unfair, either in the consignee to assign, or in himself to accept, the bill of lading. Any collusion, however, with the consignee to defeat the just rights of the consignor — as, if the indorsee *knew that the bill of exchange would not be paid*, or that the consignee was **INSOLVENT** — would have made a difference in the case. But to hold, Lord Ellenborough says, that no bill of lading was assignable, unless the assignee was perfectly assured that the goods were paid for *in money*, would tend to overturn the general practice and course of dealing of the commercial world (1) on this subject. And this reasoning seems consistent with the principle of the new enactment, namely, that the transfer of a bill of lading shall convey the property in the goods, unless the person, to whom it is transferred, has notice that the person transferring it to him is not the actual and *bona fide* owner of the goods.

Right of  
stoppage  
not to de-  
feat the  
rights of  
third per-  
sons;  
delivery  
order  
partly  
acted on,  
and goods  
sold to a  
second  
purchaser.

The right of stoppage *in transitu*, as it is an equitable right, can only be exercised where it does not interfere with the just rights of *third* persons. (2) Therefore, where a vendor of tallow (lying at a wharf) gave a written order to the wharfingers to weigh, deliver, transfer, and rehouse the same; and the purchaser sold the tallow again to a second purchaser; upon which, the wharfingers wrote to the second purchaser, acknowledging that they had transferred the tallow to *his* account — though the tallow had in fact not been weighed since the order of the original vendor, — it was held, that whatever question there might have been as between buyer and seller, in consequence of such omission as to the weighing, yet that the *wharfingers* (who were sued in trover by the second purchaser) having acknowledged that they held the tallow *on his account*, could not afterwards dispute his title, in obedience to any order of the original vendor

(1) *Cuming v. Brown*, 9 East, 506.

(2) *Hawes v. Watson*, 2 B.&C. 546. per Best J.

to stop the delivery of it to such second purchaser, notwithstanding the original vendor had not been paid by the first purchaser. (1) So, where the vendee marked a quantity of timber lying at the vendor's wharf, and a small part was forwarded by the vendor to one place, and part to another — and the vendee afterwards, and before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the vendor, and was answered that “it was *very well*” — and then, in the presence of the vendor, the plaintiff marked all the timber lying at his wharf, and afterwards marked that which had been forwarded to the other two stages; — it was held, that the vendor (after such assent to the transfer) could not retain or stop any of the timber as *in transitu*, upon the subsequent insolvency of the original vendee, to whom payment had been made by the plaintiff — whatever question there might have been as between the original vendor and vendee. (2) But a *mere resale* of goods by a vendee, who has never been in possession of the bill of lading, accompanied even with payment to him by the second vendee, will not destroy the vendor's right of stoppage *in transitu* (3) — notwithstanding the second vendee procures from the master of the ship (but without the consent of the vendor) a bill of lading to be made out to himself.

*Stoppage  
in transitu.*

Where the second sale *with the assent* of the original vendor.

Where vendee resells without ever being possessed of the bill of lading.

Before the late acts of parliament (4) above referred to (which have so materially altered the law of merchant and factor, as well as that of consignor and consignee) it was determined, that if goods were sent to a consignee *as factor*, he could not divest the consignor's right to stop them *in transitu*, by indorsing, or delivering over, the bill of lading as a *pledge* (5); for it was then considered, that an au-

Right of consignor now defeated by *factor* pledging goods.

(1) Ibid. 540. 1 Ryan & M. 6.

(4) 4 G. 4. c. 83. 6 G. 4. c. 94.;

(2) *Stoveld v. Hughes*, 14 East, 308. and see ante, 462.

(5) *Newsom v. Thornton*, 6 East,

(3) *Craven v. Ryder*, 6 Taunt. 17.

433. 1 Holt, 100. 2 Marsh. 127.

**Stoppage  
in transitu.**

authority to sell the goods gave him no right to pawn them. But now, by the 6 G. 4. c. 94. s. 5., any person may accept any goods, or bill of lading, or other document for delivery of goods, in *deposit or pledge* of any factor or agent, notwithstanding he has notice that the person pledging is a factor, or agent, — but so as to acquire no further right, than was possessed by the factor, or agent, at the time of the deposit or pledge. (1)

**Where en-  
gagement  
of con-  
signor to  
indorse,  
equivalent  
to actual  
indorse-  
ment of  
bill of  
lading.**

The indorsement of a bill of lading is not, strictly, an *actual transfer* in law of the *property in the goods* therein mentioned, though it is presumptive evidence of such a transfer — and though the possession of the bill of lading gives now, in fact, the right to dispose of the goods. But the object, and legal effect, of the indorsement *may* be ascertained by other evidence. (2) And there may be also other circumstances, which may be equivalent to such an indorsement, as against the consignor, or any other person acquainted with those circumstances. As, where merchants in Ireland consigned goods to London to be sold by their factors there, and sent them a bill of lading not indorsed, but saying that the omission was a mistake, and that they would send an indorsement — upon which the factors sold the goods — and it afterwards happening, that they were unable to pay bills drawn upon them by the consignors, the plaintiff paid the bills for the honour of the drawers, and, with knowledge of all these transactions, applied to the consignors for an indorsement of the bill of lading, which they sent him ; — it was held, under these circumstances, that the plaintiff had no right to take the goods out of the possession of the vendees of the factors, who were authorized to transfer the property in the goods, and who had actually done so. (3) But, if there be no circumstances *equivalent* to an indorsement of the bill of lading by the consignor, and the delivery of the goods is specified in the bill to be, *to the order of the con-*

**But  
where no-  
thing equi-  
valent to  
indorse-  
ment,**

(1) And see post, "Lien."

(2) Abbott on Shipping, 400.  
*Core v. Harden*, 4 East, 211.

(3) *Dick v. Lumden, Peake*, 189.

*signor or his assigns*, and the bill of lading is transmitted *unindorsed*; — the holder cannot then, by an attempt to transfer the property of the goods to a third person, divest the right of the consignor to stop them *in transitu*. (1) And, indeed, in such a case the third person would, by the terms of the bill of lading itself, have (in the language of the new act (2)) sufficient “notice that the person intrusted with the bill of lading was not the actual and *bona fide* owner of the goods.”

*Stoppage in transitu*

holder cannot transfer bill of lading.

It has been decided, that an unpaid vendor of goods may stop them before they come to the hands of the vendee's factor, though the factor has the bill of lading indorsed to him by the vendee in his hands, and is under acceptances to the vendee on a general account between them. And in such a case, where the factor became bankrupt, and the messenger under his commission, upon the arrival of the ship with the goods, went on board and seized them *after the agent of the vendor* had given notice to the captain to deliver the cargo to him, — it was held, that the vendor might maintain trover against the assignees for the goods. (3) The grounds, upon which the judgment of the Court in this case was founded, were, that the bill of lading was indorsed and transmitted by the vendees to the factor, for the *express purpose* of enabling the factor to *sell* the goods — without any reference to a loan or balance due to him from the vendee — and without any *specific pledge* of the cargo, or any particular appropriation of the bill of lading to any specific draft or balance, (which it was admitted, would have varied the rights of the parties) — and that an indorsement of a bill of lading made by a vendee to a party, merely *as factor*, carried his rights no further, than if the bill of lading had been unindorsed. It was also agreed by the Court, that where a FACTOR is incapable, by his bankruptcy, of taking possession of a cargo pre-

When vendee has transferred the bill of lading to his factor.

(1) *Nix v. Olive*, Abbott, 402.

(2) 6 G. 4. c. 94. s. 2.

(3) *Patten v. Thompson*, 5 M. &

S. 350.

*Stoppage  
in transitu.*

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viously consigned to him, his assignees, being incapable of performing the duties entrusted to the bankrupt, in respect of a *personal confidence* reposed in *him*, have no right to interpose, and prevent an unpaid vendor from stopping goods *in transitu*. (1)

It is apprehended, however, that this case, if the factor had not become a bankrupt, (when the question, of the transfer of the *personal confidence* from the factor to his assignees, could not have been raised) would now meet with a different decision under the 6 G. 4. c. 94. s. 2.; inasmuch as the vendee, being in possession of the bill of lading, must under that act have been deemed to be the *true owner of the goods*, so as to give validity to any contract made with any person to dispose of them on his account; and though the indorsement of the bill of lading might have been made to such person merely *as factor*, yet as a bill of lading is now declared to be the *symbol of ownership* in the goods, so far as to render valid any contract for the disposal of them, the legal possession of the bill of lading, *even as factor*, would, unless his principal interfered, have drawn with it the right to possess the goods, and to hold them as against all persons whatever, in virtue of his lien for the general balance due to him from his principal.

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### SECTION VIII.

*Of Goods sent, but not accepted; and of Goods ordered, but not delivered.*

Goods delivered by a bankrupt.

The assignment does not pass goods delivered by the bankrupt before his bankruptcy, on a precedent consideration, though they may not be actually *accepted* by the other party until *after* the bankruptcy.

Goods consigned

And if goods are consigned to a bankrupt upon credit,

(1) 5 M. & S. 350.

who, being apprehensive of his own insolvency, but before the commission of an act of bankruptcy, declines to accept them, and the consignor consents to receive them back,—the goods, in this case, will not pass by the commissioners' assignment. And the Court will presume a consent in the consignor to receive the goods back (1), unless the contrary appears.

*Goods not accepted, &c.*

——  
to a bankrupt.

So, where after considerable dealings between the vendor and vendee, the latter (whilst some goods that had been consigned to him were still *in transitu*) in consequence of his distresses, wrote to the vendor to say, that he was in falling circumstances, and that he would not apply for those goods; and the vendor, by return of post, answered the bankrupt's letter by saying: "If I find you an honest man, you shall have every indulgence from me,"—making no mention of the goods; but he immediately left Newcastle for London, and went to the wharf where the goods were lying, and claimed them of the wharfinger;—it was held, under these circumstances, that the contract, being rescinded before the arrival of the goods, the vendor was entitled to have them delivered up—and that, free from any lien of the wharfinger for his *general balance* due from the vendee. (2)

When contract rescinded before arrival of goods.

So, also, where goods were sold and actually delivered to the clerk of the vendee, and sent by him to the vendee's packer, to prepare them for being shipped to the vendee; and whilst they were in the packer's hands, the clerk received a letter from the vendee, *dated before the delivery of the goods*, saying, that he was ruined, and adding, "If you have purchased any goods for my account, or if any orders are given out, let the persons have their goods back, and countermand all orders;"—upon which the clerk showed this letter to the vendor, who agreed to take back the goods, though not until after they had been attached on the

Where countermand of goods before delivery, but not received till afterwards.

(1) *Atkin v. Barwick*, 1 Str. 165.  
10 Mod. 432. Fortesc. 353.

(2) *Richardson v. Goss*, 5 Bos. & P. 119.; and see *Mills v. Ball*, 2 Bos. & P. 457. and ante.

*Goods not  
accepted,  
&c.*

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same day by some of the vendee's creditors; — it was held in this case, that the *property* in the goods re-vested in the vendor, so as to avoid the attachment; as the countermand of the purchase by the vendee was dated *before the delivery* of the goods, though not received and assented to by the vendor until after such delivery. (1)

*Return of  
goods  
must be  
made in-  
stantly.*

But in all these cases of a re-delivery of goods to a vendor, the determination of the vendee to reject them must be made *instantly*; for if the goods are kept by the vendee some time after their delivery — such, for instance, as a period of four months (2) — or even, in one case, of fourteen days (3) — he cannot, when on the eve of bankruptcy, restore them to the vendor; for, though there might be no fraudulent concert between the parties, such a transaction would, in fact, amount to an undue preference of the vendor to the vendee's other creditors. Thus, where a vendee at Devizes was in the habit of receiving different parcels of wool from the vendor at Bristol; and the course of dealing was, that sometimes the wool was sent with, and sometimes without, any specific order, but the vendee had always an option to return each particular parcel, if he had no call for it: — on the 14th February the vendor, by order, sent the vendee thirteen bags of wool, which arrived on the 19th, and were then deposited in the vendee's warehouse with his other goods, — though he gave directions not to have them opened, or entered in his books, but only weighed off to see that they agreed with the invoice, as he knew that he was in embarrassed circumstances, and intended not to take them into the account of his stock, if in the event he found himself unable to go on: — on the 4th and 5th March he returned the wools to the vendor, who consented on the 7th to receive them back, which was after an act of bankruptcy committed by the vendee. Under these circumstances it was held, that

(1) *Salte v. Field*, 5 T.R. 211.; (2) *Barnes v. Freeland*, 6 T.R. and see *Graff v. Greffulhe*, 1 Camp. 80.  
89. and ante, 448. & seq. (3) *Neate v. Ball*, 2 East, 116.



the vendee, by keeping possession of the goods so long, had lost his option to return them, which ought to have been exercised immediately on the receipt of them; and the assignees of the vendee were declared to be entitled to the wools. (1)

Goods not  
accepted,  
&c.

And when the goods, after being delivered, are *once accepted* by the vendee, the vendor has then no power to reclaim them, as against the assignees of the vendee, — though the vendee has, in fact, committed an act of bankruptcy between the sale and the delivery of the goods. (2)

When  
goods  
once de-  
livered  
and ac-  
cepted;

Nor can a vendor reclaim goods, after he has done any act to recognize the sale. As where, though a vendee wished to return the goods (which were then in the hands of a packer) the vendor instituted an attachment against them, *as the property of the vendee*, — this was considered to be an election by the vendor, not to rescind the contract; and, the vendee having become bankrupt, it was held, that the goods passed by the commissioners' assignment. (3)

or when  
sale recog-  
nized by  
vendor.

But the commissioners' assignment does not pass goods contracted to be bought by the bankrupt, in which he has not the right of *possession*, as well as the right of *property*. Thus, where a vendor sold to the bankrupt by contract various parcels of hops, part of which were weighed, and an account of the weights, together with *samples* only, was delivered to the bankrupt — who, not paying for them at the usual time according to the custom of the trade, the vendor gave him notice, that unless they were paid for by a certain day they would be resold: — the hops were not paid for; and the vendor resold a part with the consent of the bankrupt before his bankruptcy, and afterwards the residue, without the assent either of the bankrupt or the assignees; but an account of the sale of the hops was delivered to the bankrupt, in which he was charged warehouse-room from the 30th August: — the assignees demanded the hops of

But bank-  
rupt must  
have the  
right of  
*possession*,  
as well as  
the right  
of *pro-  
perty*, for  
goods to  
pass.

(1) Ibid.

(3) *Smith v. Field*, 5 T. R. 402.

(2) *Harwell v. Hunt*, cited 5 T. R.

*Goods ordered, but not delivered.*

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Notwithstanding part of the price is paid.

Goods ordered by the bankrupt of a manufacturer, but not delivered.

the vendor, and tendered the warehouse rent and other charges; and, upon his refusing to deliver them, brought *trover*; — it was held, that, under these circumstances, the assignees were not entitled to maintain *that species* of action, to recover the value of the hops — notwithstanding the jury found, that the defendant had not rescinded the contract of sale; for, in order to maintain *trover*, the party must have, not only a right of *property*, but also a right of *possession*; and although a vendee of goods may acquire a right of *property* by the contract of sale, yet he does not acquire the right of POSSESSION in the goods, until he pays or tenders (1) the price. So, where the vendor received even 700*l.* IN PART of the price of goods bought by a bankrupt at certain credit, some of which were in the warehouses of other persons in the *vendor's name* — and *no notice* had been given to any of such persons to transfer them into the name of the bankrupt, but they remained after the contract of sale as they did before; — in this case it was held, also, that the assignees could not maintain TROVER for them against the vendor, without tendering the remainder of the price. (2)

So, goods which are ordered by a bankrupt to be made or manufactured — though he has even advanced money on account to the manufacturer equal to the value of the work and materials, and though the work is in fact completed — have been held not to pass to his assignees, unless the article in question has been *actually delivered* to him — or, unless the manufacturer has done some act to express an *unequivocal assent*, that the general property should be considered as vested in the purchaser. Thus, where a trader entered into a contract with a barge-builder for a barge; and before the work was begun advanced to him money on account, to the amount, at last, of the value of the barge; and the barge was completed, and the trader's

(1) *Bloxham v. Sanders*, 4 B. & C. 911.

(2) *Bloxam v. Morley*, *ibid.* 951.

name even painted on the stern; but before it was delivered, it was taken under an execution by another creditor of the builder; — it was held, that the assignees of the trader could not recover the barge in TROVER against the sheriff, — on the principle, that a buyer acquires no property in a chattel, until it is both finished and delivered to him (1) — and that painting the name upon the stern, only expressed an *intention* that the barge should belong to the trader, but did not pledge him *absolutely* to fulfil that intention.

Goods  
ordered,  
but not  
delivered.

---

And, where goods previously ordered of a manufacturer are not forwarded, or paid for, until the manufacturer has committed an act of bankruptcy, they may be recovered back by his assignees in an action of trover against the purchaser, — notwithstanding the purchaser had even accepted a bill for a larger sum than the price of the goods — if there is no evidence of any *specific appropriation* of the bill, to the payment of the price of the goods. (2)

Goods  
not for-  
warded, or  
paid for,  
before act  
of bank-  
ruptcy.

But when there is an *express appropriation* of payments made by the bankrupt (before the article purchased of him, or contracted for, is actually delivered) to the liquidation of the price of the *particular article* contracted for, — then the property in it will pass to the purchaser, *after any act of transfer*, — provided he has no notice of any act of bankruptcy. As, where a ship-builder contracted with B. to build a ship for him, for which B. was to pay, in the progress of the work, by four instalments, the two last to be payable when the ship was launched; and whilst the ship was building, she was measured with the builder's privity, in order that B. might get her registered in his name; and the ship-builder for that purpose signed *the usual certificate* of her building, upon which the ship was *registered in B.'s name*: — on the same day the third instalment was paid; and after this, and before the ship was completed or

Where  
there is an  
*appropri-  
ation of  
payments*  
to the  
liquidation  
of the  
price.

(1) *Mucklow v. Mangles*, 1 Taunt. 518.

(2) *Bishop v. Crawshay*, 3 B. & C. 415.; and see *Hurst v. Gwen-  
nap*, 2 Star. 506.

launched, the ship-builder committed an act of bankruptcy : — it was held, under these circumstances, that the legal effect of the ship-builder having signed the certificate, to enable B. to have the ship registered in his own name, was, to vest the general property in the ship in B., from the time when the registry was completed, subject to the ship-builder's lien for the fourth instalment ; and that a rudder and cordage, also, which were not affixed to the ship, but which were made and bought by the ship-builder specifically for that purpose, were to be considered as part of the ship ; and that none of this property was in the possession of the bankrupt as reputed owner. (1)

## SECTION IX.

### *Of Goods subject to a LIEN.*

(And see ante, Chapter IX. Section VI. “ Of Equitable Mortgages ;” and post, Chapter XIX. on “ Set Off.”)

Assign-  
ment does  
not divest  
a lien.

Definition  
of the  
term.

Nature of  
a lien.

The assignment of the commissioners does not divest a *legal, or equitable, Lien* of any party on the bankrupt's goods. This rule is founded upon the same principle, as that which we have often had occasion to notice, viz. that the assignees are bound by all the equities, by which the bankrupt himself was bound. A *Lien*, in its legal sense, means a right to possess or retain any thing then in the possession of the party, until a just and equitable claim, which he has either *in respect of the thing itself, or against the owner of the thing generally*, is satisfied. In the first case it is denominated a *special*, — in the last a *general* lien.

*Lien* subsists either by the common law, the usage of trade, or agreement between the parties ; and as the con-

(1) *Woods v. Russell*, 5 B. & A. & C. 419. who distinguishes this case from *Bishop v. Crawshaw*, ante.

Lien.

venience of commerce, and natural justice, are much in favor of this species of claim, the courts have, in all cases where a question of lien has been agitated, invariably shewn a disposition leaning towards the person making the claim. They will, therefore, often imply a contract of lien, either from the general course of trade, — or from the nature of the particular mode of dealing between the parties. There can be no lien, however, unless the goods, in respect of which the lien is claimed, have *actually* come to the possession of the party before the bankruptcy of the owner (1); for a *constructive* possession is not sufficient. (2) Therefore, where A. consigned a cargo to B., with a direction to pay to C. out of the proceeds a sum of money, and wrote to C. to that effect; — it was held, that C. in this case had no lien on the proceeds. (3)

Must be  
an *actual*  
*possession*.

And no one can acquire a greater lien, than the interest which the person pledging, or depositing, the property possesses in it himself. Therefore, where a tenant for life pledged plate with a pawnbroker, the latter was held to have no lien upon it, after the death of the tenant for life, against the remainder-man, — although the pawnbroker had no notice of the particular limitations of the settlement (4), which created the tenancy for life. So, a person, who has no right whatever to the property himself, can confer no lien by pledging it with another, — though the party *bonâ fide* advances money upon it, without notice of the wrongful possession of the party pledging it. (5)

No greater  
lien con-  
ferred than  
that of  
the party  
depositing.

A *Lien* upon goods, also, exists only so long as the party *continues* in possession; for if he once relinquishes possession, the rule, is that the lien is at an end. (6) There are, however, some exceptions to this rule, as where a party is *forcibly* turned out of possession of the property —

Lien exists  
only  
during *con-*  
*tinuance* of  
possession.

(1) *Patten v. Thompson*, 5 M. & S. 350. *Nicholls v. Clent*, 3 Pri. 547. *Kinloch v. Craig*, 5 T.R. 119.

(2) *Ibid.* *Taylor v. Robinson*, 8 Taunt. 648.

(3) *Ex parte Haywood*, 2 Rose, 355.

(4) *Hoare v. Parker*, 2 T.R. 376.; and see *ex parte Nesbitt*, 2 Sch. & Lef. 279.

(5) *Hooper v. Ramsbottom*, 1 Camp. 121.

(6) *Kruger v. Wilson*, Amb. 252. *Street v. Pym*, 1 East, 4.

Lien.

When it  
may re-  
vive.

the lien will revive when he *recovers* possession (1); and the like in some cases, even where he voluntarily quits possession — as, where he delivers it up to the owner upon the faith of an assignment, which afterwards turns out to be invalid. (2) So, where a party, having an equitable mortgage, delivered up the deeds upon the sale of the estate, and the sale was afterwards set aside (3) — or where he delivered up a lease to be sold under an execution, and the execution was invalidated by a prior act of bankruptcy (4), — he was held, in neither of these cases, to have lost his lien. In one case, also, where an insurance broker, having parted with the possession of a policy upon which he had a lien, obtained from his principal the policy again, upon pretence of receiving the average; — it was held, that the lien revived by thus regaining the possession (5): though, perhaps, there may be some doubt as to the correctness of this decision, — as the re-delivery of an article, in order to revive a lien, ought to be strictly for the *same purposes*, for which it was originally delivered. (6) If, however, the commodity upon which the lien attaches be of a *perishable* nature, the party may, in that case, safely part with it to the owner upon a special agreement with him, that the lien shall await the event of a legal determination. (7)

When  
goods pe-  
rishable.

When it  
is waived.

A Lien, also, may be waived or abandoned by a special agreement, which contains some term *inconsistent with the right to retain* — as where the parties contract for a *particular time* and mode of payment; but merely *fixing the price*, of labour to be done to any particular article or commodity, is no abandonment or waiver of any lien upon it. (8) So, where the owner of a ship, having a lien on the cargo until the delivery of good and *approved* bills for the freight,

(1) *Ex parte Cheersman*, 2 Eden, Rep. 181.

(2) *Brown v. Hankey*, 2 T. R. 113.

(3) *Ex parte Morgan*, 12 Ves. 6.

(4) *Ex parte Doughty*, 1 Mont. Dig. 493.

(5) *Whitehead v. Vaughan*, 1 C. B. L. 547.

(6) And see 2 Christ. B. L. 142.

(7) 1 Mont. Dig. 492. *Whitaker on Lien*, 73.

(8) *Chase v. Westmore*, 5 M. & S. 186. by which some of the older cases on this branch of the subject are overruled. See Lord Ellenborough's judgment.

took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it; — such negotiation was held to be an *approval* of the bill, and a relinquishment of his lien. (1) And, where a claim is made to retain the goods (when they are demanded) on a *different ground*, without making any mention of the lien, — the party has been held to have abandoned his lien (2); but a simple refusal to give up the property, accompanied with the observation of the party, that he “might as well give up every transaction of his life,” does not amount to such (3) abandonment.

As to how far a *delivery of part* of the goods will divest the lien of the vendor upon the residue, — see ante, “Stoppage in Transitu.” (4)

Having thus endeavoured to explain generally the nature and legal effect of a *Lien*, it is proposed now to enumerate those persons, who, by the usage of trade, or by custom recognised by law, are considered as having a *general*, or a *particular*, lien — that is, a right to retain property, either for a *general balance* due from the owner; or for work done, or expenses incurred in respect of the *specific article* retained.

A FACTOR has a lien upon *all* the property of his principal Factor. in his hands, — every thing in his possession being construed to be a pledge, not only for incidental charges, but for the *general balance* due to him. (5) And he has a lien, also, upon the *price* of goods sold by him as factor, as well as upon the goods themselves (6); which lien is available even against a claim of the crown. (7) Nor is it any objection to a factor's lien, that he has advanced money to his principal, or accepted bills drawn on him to the extent of the

(1) *Horncastle v. Farran*, 2 Star. 590. 3 B. & A. 497.

(2) *Boardman v. Sill*, 1 Camp. 410. n.

(3) *White v. Gainer*, 2 Bing. 23.

(4) Ante, 455. See also *ex parte Gwynne*, 12 Ves. 379. post.

(5) *Kruger v. Wilcox*, Amb. 252.

*Goding v. London Assurance Company*, Burr. 494. *Foxcroft v. Devonshire*, 2 Burr. 936. *Hammond v. Barclay*, 2 East, 227.

(6) *Drinkwater v. Goodwin*, Cowp. 251. *Hudson v. Granger*, 5 B. & A. 27.

(7) *Rex v. Lee*, 6 Pri. 569.

**Lien.  
Factor.**

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value (1) of the goods — provided the goods come to his hands before the act of bankruptcy of the principal. (2) But a factor's right to a *general* lien will not affect property, delivered to him for a *special purpose*. (3) And he has no lien for a debt due to him *before* he became a factor. (4) Where a factor, also, by his bankruptcy becomes incapable of taking possession of goods consigned to him, his assignees have no right to take possession; for the consignment is made to the factor, in respect of a *personal confidence* reposed in *him* for the performance of those duties, which his principal never intended should be executed by *other* persons. (5)

**As to right  
of factor  
to pledge.**

A *Factor*, who, from the very nature of his employment, has only the power given him by his principal to *sell* goods entrusted to his care, was always considered in law to have no authority to *pledge*; and could not therefore transfer his lien, as against his principal, to a third person, — even though that person had no knowledge, that he was only a factor (6); unless, indeed, the factor (by consent of his principal) exhibited himself to the world as owner. (7) The law has, however, (as has been before observed (8)), been materially altered in this respect by two statutes (9) lately passed, for the professed purpose of affording better protection to merchants and others entering into contracts with factors, or agents.

**Alteration  
of the law  
in this  
respect.**

By the last of these statutes, the 6 G. 4. c. 94., (which incorporates all the provisions of the former,) it is enacted, that any person entrusted for the purpose of consignment, or sale, with any goods, and shipping them in *his own name*, shall be deemed and taken to be the true

(1) *Rex v. Lee*, 6 Pri. 369. *Foxcroft v. Devonshire*, supra.

(2) *Copeland v. Stein*, 8 T. R. 199.

(3) *Walker v. Birch*, 6 T. R. 258. *Burn v. Brown*, 2 Star. 272.

(4) *Houghton v. Matthews*, 3 B. & P. 485.

(5) *Patten v. Thompson*, 5 M. & S. 361.

(6) *Paterson v. Fash*, Str. 1178. *Martini v. Coles*, 1 M. & S. 140.

*Daubigny v. Duval*, 5 T. R. 604. *Shipley v. Kynner*, 1 M. & S. 484.

(7) *De Leira v. Edwards*, cit. 1 M. & S. 147.

(8) Ante, 467.

(9) 4 G. 4. c. 85. and 6 G. 4. c. 94.; and see ante, 462. and 467.



Lien.  
Factor.

owner thereof, so far as to entitle the consignee to a lien thereon for advances made to the shipper, provided the consignee has no notice by the bill of lading, or otherwise, that the shipper is not the actual and *bonâ fide* owner. And the person, in whose name such goods are shipped, shall be taken to be entrusted therewith for consignment or sale, unless the contrary shall be made to appear by bill of discovery, or otherwise, or be shewn in evidence by any person disputing the fact. By section 5. any person may accept and take any goods, or mercantile document for delivery of goods, in *deposit or pledge* from any factor or agent, notwithstanding he has notice, that the person pledging is a factor or agent; — but so as to acquire no further right, than was possessed by the factor, or agent, at the time of the deposit or pledge. And this right of *pledging* goods (so as to confer the same lien, which the person pledging has himself against the owner) is by sections 2. & 3. given to any other person, besides a factor, entrusted with any mercantile document for delivery of goods, to whom advances may be made on the faith of any of such documents; — provided the person making such advances has *no notice*, that the person pledging is not the actual and *bonâ fide* owner. By section 6. the owner of goods, however, is not prevented from demanding and receiving them from his factor, or agent, before they shall have been sold or pledged, or from the assignees of the factor in case of his bankruptcy; or, from demanding or recovering from any person the price or sum agreed to be paid for the purchase of the goods, subject to any right of set-off on the part of the purchaser against the factor; and he may also recover from any person the goods pledged, upon repayment of the money, or on restoration of the negotiable instrument, advanced, or given, by such person on the security of the goods — and upon payment, also, of such further sum of money, or on restoration of such other negotiable interest, as may have been advanced, or given, by the factor to the owner himself, or on payment of a sum equal to the

Factor may now pledge to a certain extent.

Subject to the rights of the owner to recover goods on repayment of the money advanced.

Lien

amount of such instrument. If the goods have been sold by such person, then he has a lien on the proceeds for the amount of his advances. And in case of the bankruptcy of any such factor, or agent, the owner of the goods so pledged and redeemed, will be held to have discharged *pro tanto* the debt due by him to the estate of the bankrupt.

## Banker.

A *Banker* has, also, a *general* lien upon all the negotiable securities in his hands belonging to his customer, for his general balance; unless, indeed, there be evidence to shew, that he received any particular security under special circumstances, which would take it out of the common rule (1); as where a customer deposited a lease with his bankers, without stating for what purpose it was left—in which case it was held, that they had no lien on it for their general balance. (2)

## Insurance broker.

An *Insurance broker* has been held to have a *general* lien on all policies in his hands; and, though, he parts with the possession of a policy, yet if it come again into his hands, the lien revives. (3) But, if a broker knows that the person, who employs him to effect an insurance, is an agent, and not the principal, the broker has then (in the event of the agent's bankruptcy) no lien upon the policy for any *general* balance due to him from the agent—but only for the charges and expenses of effecting that particular policy. (4) If, however, he has *no notice* that the policy is not on account of the person from whom he receives the order, he will then have a lien upon it for his general balance due from such person—and have a right, also, to apply to the satisfaction of that balance, money received upon the policy, as well after, as before, notice that it belongs to a third person; but, if *after* notice he pays over

(1) *Davis v. Bowsher*, 5 T.R. 488.  
*Jourdaine v. Lefevre*, 1 Esp. 66.  
*Bent v. Puller*, 5 T.R. 494. *Giles v. Perkins*, 9 East, 12. *Bolland v. Bygrave*, 1 Ryan & M. 271.; and see ante, p. 429.

(2) *Lucas v. Dorrien*, 7 Taunt. 164. 1 Moore, 29.

(3) *Whitehead v. Vaughan*, 1 C. B. L. 129. *Park v. Carter*, *ibid.*

(4) *Maass v. Henderson*, 1 East, 334. *Snook v. Davidson*, 2 Camp. 218.

the surplus to the agent, he will then be liable to repay it to the principal. (1) Ben.

A *Packer* may, from the mode of dealing with his employer, be in the nature of a factor,—and entitled, therefore, to a lien upon all goods in his hands, not only for the price of packing, but also for any other debts owing to him. (2) Packer.

So a *Wharfinger* has a general lien upon all goods deposited at his wharf, and left under his (3) care. But where the wharfage due upon goods imported was, by the course of dealing between the parties, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not; and the goods were before Christmas sold to A., and after Christmas the merchant importer became bankrupt;—it was held in this case, that the wharfinger had no lien on the goods against A. for the wharfage, inasmuch as the course of dealing between the parties was inconsistent with any right to retain. (4) Wharfinger.

A *Fuller*, by the custom of the trade at *Easter*, has a lien upon goods in his possession, sent to him by a clothier to be fulled, for a general balance due to him. (5) But, generally, a fuller has only a lien for work done on the particular cloth in his possession. (6) Fuller.

So, also, a *Dyer* has a lien for dyeing the specific goods, but no further (7); though, from the usage of the trade in the place or district where he carries on his business, his right may be extended to a lien for his general balance. (8) And, Dyer.

(1) *Mann v. Forrester*, 4 Camp. 60.

(2) *Ex parte Deeze*, 1 Atk. 228. *Green v. Farmer*, 4 Burr. 2222.

(3) *Naylor v. Mangles*, 1 Esp. 109. *Spears v. Hartley*, 3 Esp. 81. *Richardson v. Goss*, 3 B. & P. 124.

(4) *Crawshaw v. Humfray*, 4 B. & A. 50.

(5) *Sevest v. Pym*, 1 East, 4.

(6) *Rose v. Hart*, 8 Taunt. 499. 2 Moore, 547.

(7) *Green v. Farmer*, 1 Bl. 651.

*Bennett v. Johnson*, 2 Chitt. Ca. temp. Mansfield, 456.

(8) *Saville v. Barchard*, 4 Esp. 53. *Humphreys v. Partridge*, Mont. B.L. App. 18. *Close v. Waterhouse*, 6 T.R. 523. in note. The places, where this usage has been recognized, are London (4 Esp. 53.), Gloucestershire (Mont. App. 18.), and some particular district in the West of England, per Gibbs C.J., 8 Taunt. 500.

Lien.

where an agreement was entered into by a number of dyers at a public meeting, that they would not receive any more goods to be dyed, except on condition that they should respectively have a lien on those goods for their general balance,—it was held, that any one, who after notice of such agreement delivered goods to any of those dyers, was to be taken as assenting to their terms—and, consequently, could not demand goods so delivered, without paying the balance of his general (1) account.

## Printer.

A *Printer* employed to print certain numbers of an entire work, though not all consecutive numbers, has a lien upon the copies not delivered, for his *general balance* due for printing the whole of the work. (2)

## Calico printer.

So a *Calico-printer* has a *general* lien upon the linen in his possession, not only for the price of printing the particular linens, but also for the price of printing others, which have been previously delivered to him. (3)

## Miller.

A *Miller*, however, has only a lien upon flour and sacks in his possession, for the price of grinding the particular quantity of corn of which that flour is composed, but no (4) further.

## Carrier.

A *Common Carrier* is not entitled to a lien for a *general* balance, upon goods delivered to him for carriage, unless upon special agreement. (5)

## On a ship.

With respect to the particular lien attaching on a *Ship*, for repairs, or provisions,—the person repairing has only a lien upon her for the costs, as long as she remains in his possession—the lien ceasing, when possession is parted

## Of a shipwright.

with. (6) But where a shipwright, by the usage of trade (like that prevailing in the river Thames) gives a certain

(1) *Kirkman v. Shawcross*, 6 T.R. 14.

(2) *Blake v. Nicholson*, 3 M. & S. 167.

(3) Ex parte *Andrews*, 1 C.B.L. 429. *Weldon v. Gould*, 3 Esp. 268.

(4) Ex parte *Ockenden*, 1 Atk. 235.

(5) *Kirkman v. Shawcross*, supra. *Aspinall v. Pickford*, 3 Bos. & P.

44. *Oppenheim v. Russell*, ibid. 42. *Rushfield v. Hadfield*, 6 East, 519. 7 East, 224.

(6) *Watkinson v. Bernardston*, 2 P.W. 367. Ex parte *Shank*, 1 Atk. 234. *Watkins v. Carmichael*, Doug. 97. Ex parte *Bland*, 2 Rose, 91. *Woods v. Russell*, 5 B. & A. 942. Ex parte *Hill*, 1 Mad. 61. *Franklin v. Hosier*, 4 B. & A. 341.

Lien.

*credit* to the ship-owner for the amount of the repairs, Lord Ellenborough held, that in this case he had no lien, without an express agreement for that purpose; — for that the lien of an artificer was wholly inconsistent with a *dealing on credit*; and could only subsist, where payment was to be made the moment the work was completed, and where there was an immediate right of action for the debt. (1) If, however, the repairs or the refitting take place in a port *abroad*, then, for the necessity and encouragement of trade, the lien continues, though the ship is out of the possession of the party (2); for, by the maritime law, any contract of the master for repairs, or provisions, amounts to an hypothecation of the ship. (3) But, where bills of exchange were given by the captain for advances made to him abroad, which were not precisely shown to have been appropriated for the use of the ship — and the bills did not appear upon the face of them to have been drawn for the purposes of the ship, — such bills were held, *prima facie*, evidence against the inference of the advances being made on the credit of the ship itself. (4) Though the master, however, can hypothecate a ship for repairs done abroad, he has no lien *himself* on the ship for money expended by him in respect of those repairs; — for it does not follow, because others through him acquire a lien on the ship, that therefore he himself has such a lien, — a lien being frequently derived through the act of a servant, which the servant himself does not possess. (5) Neither has the

Of the master.

(1) *Raitt v. Mitchell*, 4 Camp. 146.

(2) *Ex parte Shank*, 1 Atk. 234. *Watkinson v. Bernardiston*, *supra*, and the cases there cited in note.

(3) *Justin v. Ballam*, 1 Salk. 34.

(4) *Ex parte Halkett*, 2 Rose, 229. 19 Ves. 474. 2 Rose, 194. 3 V. & B. 135. Lord Eldon is reported to have said in this case, that a ship may be bound by bill of sale, but not by *parol*; — from which the reporter has inferred generally, that no lien on a ship

can be created by *parol*; — but this position would be contrary to all the cases, which decide, that a party, furnishing the ship with repairs and necessaries *abroad*, has a lien upon her, without any instrument of express hypothecation. 1 Atk. 234. 2 P. Wms. 367. 1 Salk. 34.; and see *Hussey v. Christie*, 13 Ves. 599.

(5) *Wilkins v. Carmichael*, Doug. 101. *Hussey v. Christie*, 9 East, 426. Abbott on Shipping, 419.

- Lien.** master any lien on the ship for his wages ; — his case, in this respect, being distinguished from that of all other persons belonging to the ship. (1) And, as a lien on the freight is always consequential to a lien on the ship, he has also no lien on the freight, either for his wages, or disbursements on account of the ship. (2) But the consignee of a ship for sale, to whom the ship and register are delivered, has a lien upon her, for money expended for repairs and seamen's wages. (3)
- As to the freight.**
- Consignee of a ship.**
- Ship owner.** The *Owner of a Ship* has a lien on the cargo for the freight; but his lien is confined to the amount of freight for goods actually carried, and cannot be extended to his claim for what is called *dead freight*, that is, an unliquidated compensation for the loss of freight, by reason of the freighter not putting a full cargo on board. (4) And where the parties to a charter-party mutually bound themselves, especially the ship-owners, the ship, tackle, &c., and the freighter, the goods to be put on board, in a penal sum for the performance of the conditions of the charter-party, — yet this was held not to give the owner a lien on the cargo for dead freight, or demurrage; for, as the clause was intended to be mutually obligatory, and the freighter had in that case no lien on the ship, the Court said, it would be therefore absurd to hold, that the clause gave a lien on one side, without the like remedy on the other. (5) Where the owner also has by the contract of charter, in letting the ship to freight, *parted with the actual possession* of the ship, he can then have no lien for the freight on the cargo; as the cargo, in this case, was never in his possession. (6) But, where there are no express words of demise in the charter-party of the ship itself, the mere occupation of the ship by the freighter will not prevent the owner from being

(1) *Wilkins v. Carmichael*, supra.(2) *Smith v. Plummer*, 1 B. & A. 575. *Atkinson v. Cotesworth*, 3 B. & C. 647.(3) *Hammonds v. Barclay*, 2 East, 227.(4) *Phillips v. Rodie*, 15 East, 547.(5) *Birley v. Gladstone*, 3 M. & S. 205.(6) *Vallejo v. Wheeler*, Cowp. 143. *Trinity House v. Clark*, 4 M. & S. 228. *Hatton v. Brigg*, 2 Marsh. 389. 7 Taunt. 114.

considered still in the possession of the ship, so as to preserve his lien. (1) Part-owners of a ship are tenants in common, and not joint-tenants; and, therefore, if one becomes a bankrupt, being indebted to the other owners for outfit, freight, and as managing owner, they have no lien on his share for their debt; but his share passes to the creditors under the bankruptcy. (2)

A vendor of real property is, as we have seen (3), entitled to an *equitable* lien upon an estate sold, for so much of the purchase money as remains unpaid, unless the vendee can show, that the lien has been clearly relinquished by the vendor. (4) For, though the conveyance of the property states (contrary to the fact) that the purchase money is paid, and the estate passes by the conveyance at law — it does not, *in equity*, until actual payment, notwithstanding even a receipt for the money is indorsed upon the deed. (5) This lien, however, is held to be abandoned, by the vendor's acceptance of a security for the purchase-money from some other person, when it appears that credit was given *exclusively* to such person. But the vendor's lien is not discharged by taking bills of exchange, or other *negotiable* securities, for the purchase-money payable by other persons; as these are considered, not so much in the nature of a security, as of a mode of payment. (6) Where, however, there was a *covenant* between the vendor and purchaser, that the purchase-money should be paid within two years after the re-sale of the premises, — that was held to discharge the vendor's lien, as it afforded evidence, that the vendor meant to rely on the *personal* security of the pur-

Lien.

Vendor  
of real  
property.

(1) *Tate v. Meek*, 2 Moore, 278. *Yates v. Bailston*, *ibid.* 294. *Saville v. Champion*, 2 B. & A. 503.

(2) *Ex parte Young*, 2 Ves. & B. 242. *Ex parte Harrison*, 2 Rose, 76.; but see *Doddington v. Hallett*, 1 Ves. 497. *contra*.

(3) *Ante*, page 209.

(4) *Chapman v. Turner*, 1 Vern. 267. *Austin v. Halsey*, 6 Ves. 475.

*Hughes v. Kearney*, 1 Sch. & Lef. 132. *Mackreth v. Symmons*, 15 Ves. 329.; and see *Blackburn v. Gregson*, 1 Bro. 424. Eden's ed. (note.)

(5) *Winter v. Lord Anson*, 1 Sim. & S. 444.

(6) *Grant v. Mills*, 2 Ves. & B. 306. *Ex parte Loaring*, 2 Rose, 79. *Ex parte Peake*, 1 Mad. 346.; and see Sugden V. & P. ch. 12.

Lien.

chaser. (1) And where a *bond* was executed by the vendee for payment of the purchase-money and interest at the death of the vendor, — the Vice-Chancellor decided, that the vendor had no lien on the estate; for that when the bond was executed, the estate passed to the vendee in equity, as well as at law. (2)

Vendor of  
personal  
property.

In the case of the *sale of a lease and furniture*, though the vendors had brought an action and obtained judgment against the purchaser for the amount of the purchase-money, yet, as possession had not been actually delivered up, Lord Eldon thought that the vendors had a lien upon the furniture, as well as the house, as against the assignees of the purchaser. (3) But, where timber felled was sold to a trader, who became a bankrupt after having taken away part, Lord Eldon considered it doubtful, whether the vendor had a lien for the purchase-money upon the remainder; as it was questionable, whether such a delivery had not taken place, as was sufficient to vest the whole of the timber in the purchaser. (4)

Equitable  
lien on  
goods.

In cases of an *equitable lien on goods* generally, that is, where the real and beneficial interest in property is in a creditor at the time of his debtor's bankruptcy, though the legal estate is in the bankrupt, — the assignees are subject to the same equities as the bankrupt himself, and will not, in such a case, be permitted to take advantage of the relation to the act of bankruptcy. Thus, where a trader makes an assignment of goods at sea, as a collateral security for a debt — and then commits an act of bankruptcy — and afterwards indorses the bill of lading to the creditor, — the creditor is entitled to the goods as against the assignees. (5) But where goods, upon which the creditor of a trader (*before* an act of bankruptcy committed by him) had an equitable

(1) *Ex parte Parkes*, 1 G. & J. 228.

(2) *Winter v. Lord Anson*, *supra*; and see *Cood v. Pollard*, 9 Pri. 544. 10 Pri. 109.

(3) *Ex parte Lord Seaforth*, 1 Rose, 306.

(4) *Ex parte Gwynne*, 12 Ves. 379.

(5) *Lempriere v. Pasley*, 2 T.R. 485.; and see post, Chap. XVI. "Relation."



lien, are no longer in existence, — such lien will not, in that case, attach upon *other* goods, substituted for the former by the trader *after* he had committed an act of bankruptcy. (1) Therefore, where a merchant pledged for value the bills of lading of an expected cargo, and his agents abroad (without his knowledge) disposed of part of the cargo; after which, having committed an act of bankruptcy, he induced his agents to replace the goods by others, and then sent the bills of lading of the substituted goods to the pawnees of the former cargo, in order to make good their security; — it was held, that the assignees might recover the substituted goods in trover against the pawnees. (2)

Lien.

But the general lien of a *vendor of goods*, for the amount of the price, exists only during such time, as the goods are not actually delivered to the vendee. What acts will amount to such a delivery, so as to divest him of this lien, have been already considered in treating of the right of “Stoppage in transitu.” (3)

Vendor of goods.

As to the lien of an *attorney and solicitor*, see post, Attorney. Ch. 22.

And as to a *landlord's* lien for rent, see ante, Ch. IX, Landlord. Sect. XVII.

A creditor, having a lien on property in his hands, waives his lien if he proves his debt (4), or even obtains an order to prove (5); and will in either of such cases be directed, on petition, to deliver up the property to the assignees.

Proof, a waiver of lien.

(1) *Meyer v. Sharpe*, 5 Taunt. 74.

(2) *Ibid.*

(3) *Ante*, page 452.

(4) *Ex parte Solomon*, 1 G. & J. 25.

(5) *Ex parte Hornby*, Buck, 551.

## SECTION X.

*Effect of the Assignment upon the Claims, and Process, of the Crown.*

Crown  
may issue  
process for  
its debt  
*before* as-  
signment.

The Crown — not being bound by the provisions of any act of parliament in which it is not expressly named, and not being mentioned by the present, or indeed by any former bankrupt act, among the general creditors of the bankrupt — is not barred, therefore, of any of its paramount rights over the other creditors (1); and may consequently issue process for the recovery of its own debt, notwithstanding a commission of bankruptcy is sued out against its debtor. But this is only *before an actual assignment* of the bankrupt's property by the commissioners; for, *after* the assignment, the property is wholly changed and divested out of the bankrupt. (2)

Operation  
of an  
extent.

An extent served upon the property of the bankrupt *before* assignment will bind from the *teste* of the writ (3); and it seems, that it has the same operation upon *debts* due to the bankrupt, as upon *goods* in his possession, and that both are equally bound from the *teste* of the writ (4); though it has been decided, in cases where the king's debtor himself was before the Court, that *debts* were only bound from the *teste* of the inquisition. (5) And the Crown will not be prejudiced by any fraction of a day; for though the extent is tested the same day as the assignment, the Crown, it has been held, will be preferred. (6)

Necessity  
of provi-  
sional as-  
signment.

When it is apprehended, therefore, that any extent will issue against the bankrupt's property, the commission

(1) *Ex parte Russell*, 19 Ves. 165.

(2) *Rex v. Cotton*, 2 Ves. 295.

(3) *Audley v. Halsey*, Sir W. Jones, 202. *Rex v. Pirley*, Bunb. 202. *Rex v. Bewdley*, 1 C. B. L. 372. *Leckmere v. Thoroughgood*, 3 Mod. 236. *Roake v. Dayrell*, 4 T. R. 408.

(4) *Queen v. Arnold*, 7 Vin. 104.

S. C. West on Extents, 327.; and see *ibid.* 164.

(5) *Attorney General v. Ekeall*, Bunb. 199. *Rex v. Green*, *ibid.* 265.; and see *Rex v. Glenny*, 2 Pri. 396.

(6) *Rex v. Crumpton, Parker*, 126.; cit. 2 Ves. 295. Sed vide post, Ch. 16. s. 4.

should be sealed with all possible dispatch, in order that the party may be adjudged a bankrupt, and a *provisional assignment* executed forthwith to bar the process of the Crown. Of so great importance, indeed, is this proceeding to the interest of the bankrupt's general creditors, that Lord Eldon, upon one occasion of this kind (that of *Castell and Powell's* bankruptcy) did not complain of being called up in the middle of the night to seal a commission, with the avowed object of preventing an extent, — considering it his duty, as he said, to hold an even hand between the Crown and the subject. (1)

*Process of the crown.*  
—

If an extent is issued against one partner, the Crown can only take the separate interest of the partner; and that, liable to the partnership debts. (2)

Extent against one partner.

When property of *various description* is seized under an extent issued for a debt due to the Crown, the Crown has a right to *elect* out of which species of property it will be satisfied its debt, before any other creditor of the bankrupt, having a claim or lien upon any portion of that property, can insist upon such claim. (3)

Crown has a right to elect.

Although the bankrupt's effects taken on an extent have been sold (under a *venditioni exponas*) in default of claim, this does not conclude his assignees; and they will be allowed, on application, to enter their claim, and plead in such a case, on payment of the costs of the sale and the application, and putting the prosecutor of the extent in the same situation, as if the claim and plea had been entered in due time (4); and the delay of a month is not considered as *laches* on the part of the assignees (5), though any considerable delay will strongly prejudice their claim. (6)

Assignees not concluded by goods being sold.

The prerogative of the Crown to recover its debt by the summary process of extent, is extended as a privilege to the king's debtor, in order that the Crown may be more

Of extents in aid.

(1) *Wydown's case*, 14 Ves. 88.

(4) *Rex v. Adams*, 5 Pri. 39.

(2) *Rex v. Saunderson*, Wightw.

(5) *Ibid.*

50.

(6) *Rex v. Jones*, 8 Pri. 108.

(3) *Ex parte Rowton*, 1 Rose, 15. 17 Ves. 426.

*Process of  
the crown.*

restric-  
tions as  
to issuing  
them.

speedily satisfied its own debt; and this species of extent is called an *extent in aid*. Great abuses, however, having been committed in the issuing of these extents, and grievous injustice often occasioned by them to the general creditors of a bankrupt, they have been limited in their operation by the salutary provisions of a recent act of parliament, passed in the latter part of the last reign. (1) By this act (2) the king's debtor cannot levy under an extent in aid more than the amount of the debt which he himself owes, notwithstanding his own debtor, against whom the extent is issued, may owe him a larger debt. And with respect to the remainder of his debt, he is put upon the same footing as every other creditor. An extent in aid, also, cannot be sued out by any (3) *simple contract* debtor to the Crown; nor by any person indebted to his majesty by bond, for paying any particular duty which shall be payable in respect of his *trade or calling*; nor by any sub-distributor of stamps, who may have given bond to his majesty; nor by any person who shall give bond as a *surety* only for some other debtor to his majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, and then only to the amount of such demand. But these restrictions are not to affect a person, who may become a debtor to the king as a *collector of revenue*, by simple contract, in case he shall be bound by bond, or specialty of record in the exchequer, for paying over to his majesty the particular duties which shall constitute the debt, that may be then due from such person to his majesty. And no extent in aid (4) can issue on a bond given by any *surety*, for the payment of duties due from any *insurance company*.

To what  
debts their  
operation  
confined.

In order, also, to relieve the bankrupt's creditors from the operation of any fraudulent extent in aid, it is by *section 71*. of the new bankrupt law provided, that if any real or per-

(1) 57 G.3. c.117.

(2) Sections 1, 2, 3.

(3) Section 4.

(4) Section 5.

sonal estate, or debts of any bankrupt be extended, *after* *Process of  
the crown.*  
 he shall become bankrupt, by any person, under pretence  
 of his being an *accountant of or debtor to the king*, the  
 commissioners may examine upon oath, whether the debt  
 was due upon any *contract originally made between such  
 accountant and the bankrupt*; and, if made with any *other  
 person*, then the commissioners may sell and dispose of the  
 bankrupt's estate and effects, and the sale will be valid  
 against the extent and all persons claiming under it.

But, by a statute passed in the last session of parliament *New bank-  
rupt act  
not to  
affect the  
provisions  
of 57 G. 3.  
c. 34.*  
 (7 G. 4. c. 30. s. 1.), it is declared, that the new statute re-  
 lating to bankrupts shall not extend to repeal, alter, or  
 abridge any powers or provisions for enabling the com-  
 missioners for the execution of the act (1), (authorizing the  
 advance of money for carrying on public works and fisheries,  
 and for the employment of the poor,) or of any subsequent  
 acts for amending or extending the said act, to enforce pay-  
 ment of any loan or advance made by them, in case of the  
 bankruptcy of any party to whom such loan or advance has  
 been, or shall be made, or in case of the bankruptcy of  
 the sureties of any such party.

In the 57 G. 3. c. 34. (the act which authorizes such ad-  
 vances for public works and fisheries) there is a limiting  
 clause, that no person, borrowing money under the pro-  
 visions of that act, shall be liable for more than the amount  
 of his subscriptions or shares in the public work, for carry-  
 ing on which the money was borrowed. This clause is  
*omitted* in the subsequent act of the 3 G. 4. c. 88.; and it is  
 provided in the last-mentioned act, that all the enactments  
 of the 57 G. 3. shall continue in force, except where the  
*contrary* is expressed. But, though nothing expressly alter-  
 ing that clause is mentioned in the last act, yet it was holden  
 by the Vice-Chancellor to be quite clear, that the limiting  
 clause, from being omitted in the last act, was intended to  
 be repealed. (2)

(1) 57 G. 3. c. 34.

*William Elford*, sittings after Trin.(2) *Ex parte Holden*, in re *Sir T.* 1826.

**Process of  
the crown.**

When an immediate debtor to the Crown may sue an extent in aid.

An immediate debtor to the Crown—to whom money had been paid by the district collector of excise, and who had entered into the usual bond to the Crown to pay over the money, or remit good bills for the amount within twenty-one days after the receipt of it—is not entitled to sue out an *extent in aid*, unless there has been, in point of fact, a literal breach of the condition of the bond. (1) But the Court of Exchequer will not interfere, on the behalf of the assignees of a bankrupt, to set aside an extent in aid, if there is any doubt, whether there is a debt due from the prosecutors of the extent to the Crown, or not. (2)

Operation of warrant of the commissioners of the land tax.

Money collected for the *land tax*, in the hands of the collector, is a debt due to the king; and a warrant from the commissioners of the land tax, executed before the assignment, will bind the property, though it be not removed until after the assignment. But the warrant of the commissioners is not equal in its operation to that of an extent; for it only binds the goods from the *time of seizure*, and not from the *date of the warrant*. (3) After the execution of a warrant, if the effects seized under it are insufficient to pay the whole debt due to the Crown, an extent may also issue for the same debt. (4)

As to a recognizance.

A mere *recognizance* (though a debt upon record due to the Crown) has no operation upon the bankrupt's property, until some process of seizure is issued upon it. (5)

As to lien of crown for excise duties.

Independently of the rights which the Crown possesses against its *general debtor* by process of extent, the different *Excise acts* (imposing duties on various articles) give it, in most cases, an absolute lien upon the *subject matter* of the duty, and the utensils employed in the manufacture of it. Thus, where an information was exhibited against a candle-maker (though after a commission of bankruptcy had issued against him, and even *after assignment*) for non-payment of

(1) *Rex v. Tarlton*, 9 Pri. 647.

(2) *Evans v. Solly*, 9 Pri. 525.

(3) *Brassey v. Dawson*, 2 Str.

(4) *Rex v. Jones*, *supra*.

(5) *Ex parte Usher*, 1 Ball & B.

197. 1 Rose, 366.

the single duties upon candles, and he was convicted in the penalty of double duties, — the Court of King's Bench held, that all the candles, materials, and utensils in the hands of the assignees were liable to the payment of the double duties. (1) So, where malt duties were unpaid at the time of the execution of the assignment, the malt in the hands of the assignees was held to be subject to the payment of the duties, and liable to be seized under an extent issued after the date of the assignment. (2)

Possession of  
the crown.

But, as the lien given under the Excise acts is only upon the particular goods or articles, to which the duty attaches, — a warrant, therefore, to levy a duty, or a penalty, upon a bankrupt's goods generally (after the commissioners' assignment) is bad, — and will not justify even a seizure of the very articles, to which the duty, or the penalty, does really attach. Thus, where a soap-maker incurred a forfeiture for concealing soap contrary to the 1 G. 1. c. 36. s. 2.; and on his becoming bankrupt, a provisional assignment of his estate was executed, and afterwards the soap was condemned, and the bankrupt convicted; — a warrant to levy on his goods generally was held illegal, as being a warrant against all the bankrupt's goods, when only some of them were liable. (3) So, where under the 3 G. 4. c. 95. s. 10., the Crown had a lien on certain stage-coaches, horses, &c., in respect of duties accruing thereon, — it was held, that such lien only extended to the particular duties on each coach, &c., and not to the general stock of the party. (4)

Lien only  
on those  
goods to  
which duty  
attaches.

A general  
warrant  
therefore  
to levy on  
all goods,  
illegal.

In the case of assessed taxes being in arrear from the bankrupt (5), — his goods and chattels, before removal by the assignees, are liable to the collector for all arrears of duties due at the time of their taking possession of the goods, or which shall be payable for the year, in which they shall so take possession. If the duties are claimed for more

Lien for  
assessed  
taxes, pay-  
able for  
one year.

(1) *Stracey v. Hulse*, 2 Doug. 411.

(2) *Attorney General v. Senior*, and *Res v. Fowler*, 2 Doug. 416.

(3) *Austin v. Whitehead*, 6 T.R. 436.

(4) *In re Day*, 1 M'Clell. & Y. 384.

(5) 43 G. 5. c. 99. s. 37.

***Process of  
the crown.***

than one year, the assignees may take the goods on paying the collector one year's duties; and if they refuse to do this, then the collector may distrain for the whole arrears of duties.

**Assignees  
of army  
agent  
bound to  
render ac-  
count of  
unclaimed  
balances.**

Where an *army agent* became bankrupt, the assignees were held bound to render an account to the Crown of unclaimed balances (remaining in the hands of the bankrupt) on money intrusted to and received by him, on account of officers belonging to the several regiments for which he was agent, — and also a statement of their names and ranks; and *that*, for any period of time during the agency, however remote; which accounts the Crown is entitled to demand from any agent under the 45 G. 3. c. 58. And the attorney-general may compel the assignees to furnish such an account, by filing an information against them and the bankrupt in the Court of Exchequer. (1)

(1) *Attorney General v. Ross*, 8 Pri. 190.

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## CHAP. XII.

## OF THE DIVIDEND.

- SECT. 1. *Of the first Dividend.*  
 2. *Of the second and the final Dividend.*  
 3. *Of unclaimed Dividends.*  
 4. *How a Dividend is to be recovered.*
- 

## SECTION I.

*Of the first Dividend.*

By section 107. (1) the commissioners are directed, not sooner than four, nor later than twelve calendar months from the issuing of the commission, to appoint a public meeting, (whereof twenty-one days' notice is to be given in the Gazette) to make a dividend of the bankrupt's estate; at which meeting all creditors, who have not before proved their debts, are entitled to prove them; and the commissioners are then to order such part of the net produce of the bankrupt's estate (in the hands of the assignees) as they shall think fit, to be forthwith divided amongst such creditors as have proved debts under the commission, in proportion to their respective (2) debts. One part of the order for the dividend must be filed amongst the proceedings under the commission, and another part is to be delivered to the assignees; and it must contain an account of the time and place where it is made, of the amount of the debts

When  
dividend  
to be  
made.

How order  
to be  
drawn up.

(1) This section is taken chiefly from the 5 G. 2. c. 30. s. 33., the only difference being, that the commissioners are directed to make the dividend, instead of the assignees.

(2) And see Lord Loughborough's General Order, 8th March 1794.

*First dividend.*

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Receipts  
for di-  
vidend.

Assignees'  
accounts  
to be first  
audited.

Not com-  
pellable  
before  
four  
months to  
make a  
dividend.

How to  
compel as-  
signees to  
make a  
dividend.

proved, and of the money remaining in the hands of the assignees to be divided; — as well as how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the commissioners to be retained by the assignees, with their reasons for allowing the same to be so retained. The assignees are then forthwith to make the dividend, and to take receipts (in a book to be kept for that purpose) from each creditor for the dividend received. The order of the commissioners, and the receipt of the creditor, will be a discharge to every assignee, for so much as he shall pay pursuant to such order. But no dividend is to be declared, unless the accounts of the assignees have been first audited (1) by the commissioners in the manner directed by the 106th section; nor unless the assignees shall deliver in a statement upon oath of all money received by them, pursuant to the directions contained in the same section. (2)

The assignees, therefore, cannot be compelled, and indeed are now incompetent, to make a dividend of the bankrupt's estate, *before* the expiration of *four calendar months* from the commission. (3) But after that time, if they have sufficient funds in their hands, it is their duty to apply to the commissioners to appoint a meeting (4) to declare one; — though the precise time (until the expiration of twelve calendar months from the issuing of the commission) must rest with the assignees. (5)

If the assignees, after the expiration of four months, *refuse* to make a dividend, they are bound to account satisfactorily for such (6) refusal; and if they do not, any creditor (who has proved a debt) may apply to the commissioners to appoint a meeting, for the assignees to show

(1) This is taken from the 49 G. 3. c. 131. s. 5.

(2) And see ante, page 327.

(3) *Cooper v. Pepys*, 1 Atk. 106.

(4) The meeting to declare a dividend (as well, indeed, as all other public meetings under every

town commission) is now held at the new Court of Commissioners of Bankrupts in Basinghall-street.

(5) *Treves v. Townsend*, 1 Bro. 385.

(6) *Ex parte Grosvenor*, 14 Ves. 590.

cause why they refuse to make a dividend (1); and the summons and the meeting may be had without any expense to the creditor (2); as it is the practice of the commissioners in London to take no fees for such meetings. (3) The meeting to shew cause is not advertised, but the assignees are merely privately summoned before the commissioners. If the commissioners decline to appoint such meeting, or the assignees refuse to obey the commissioners' order to make a dividend, the Lord Chancellor will then, upon petition, order the assignees to attend the commissioners, and direct the latter to declare a dividend, if, upon examining the accounts and the assignees upon oath, they find there is a sufficient fund. (4)

*First dividend.*

The Lord Chancellor may, in his discretion, postpone the dividend beyond the time limited by the statute; but he will not do so, unless fully satisfied that the postponement will be for the general benefit of all the creditors, and that the parties applying for the postponement have a right so to apply. Therefore, where a petition was presented by creditors of surviving partners, that the dividend might be postponed, until those (who were also creditors of the deceased partner, and who had filed a bill against his representatives, for an account of his assets and payment of their debts) should have gone in under the decree; — the Lord Chancellor dismissed the petition, on the ground, that there was no equity, in the creditors of the surviving partners, to make such an application. (5)

Lord Chancellor may postpone the dividend.

If the assignees neglect to make a dividend in proper time, and wilfully retain or employ any monies of the bankrupt's estate to the amount of 100*l.* for their own benefit, they are chargeable with interest at the rate of 20*l.* per cent. on all such money, for the time during which it has been so retained or employed. (6) And they have

Penalty on assignees keeping money in their hands.

(1) And see General Order, 8th March 1794.

(2) 1 C. B. L. 521.

(3) Eden, 353.

(4) Ex parte *Whitchurch*, 1 Atk. 91.

(5) Ex parte *Kendall*, 1 Rose, 71. 17 Ves. 514.

(6) Section 104.; and see ante, 338.

*First dividend.*  
—

been charged with common interest, though the money has lain at a banker's, and they have not been paid interest for it. (1)

Where a claim entered on proceedings.

Where a claim has been properly entered on the proceedings, the person making the claim is entitled to have a dividend reserved upon it; but such dividend must be retained by the assignees, until the claim is duly substantiated as a debt (2); and at a second or final dividend, the claim, if not substantiated, should be struck out. (3)

Creditor only entitled to dividend upon the amount of his real debt.

If a creditor has been permitted to prove upon an instrument of larger amount than his real debt, he will not be entitled to receive dividends to a greater amount, than upon the real debt due to him. (4) And if the consideration, of bills of exchange proved under the commission, is other bills given by the creditor to the bankrupt, the payment of the dividend must be stayed upon his proof, until the extent of his real claim against the bankrupt is ascertained (5); or the proof must be reduced *pro tanto*, if he has already received part of his debt upon any other security.

When dividend may be retained. Must be refunded when debt expunged.

If a creditor has obtained an unfair possession of the bankrupt's property, his share of the dividend may be retained, until he gives up the property. (6) And as a creditor, by proving, has submitted himself to the jurisdiction in bankruptcy, the Lord Chancellor, when he directs a debt to be expunged, has power to order any dividend that has been received under it to be refunded. (7)

Solicitor's charge.

The solicitor's charge for computing the dividends, and preparing and copying a list of the debts, will be allowed in the assignees' accounts.

Whether an assignee

It is somewhat doubtful, whether an assignee has a right

(1) *Hilliard's case*, 1 Ves. 89.  
*Treves v. Townsend*, 1 Bro. 384.

(2) And see ante, page 307.

(3) 1 Christ. B. L. 562.

(4) Ex parte *King*, 1 C. B. L. 156.  
Ex parte *Crossley*, *ibid.* 157. Ex parte *Bloram*, 6 Ves. 449. 600.

(5) Ex parte *Clawricarde*, 1 C. B. L. 160.

(6) Ex parte *Smith*, 3 Bro. 46.

(7) Ex parte *Burn*. Ex parte *Dewdney*, 2 Rose, 59. note.

to retain a dividend, as a set-off against a private debt due to him from the creditor. There have been different decisions upon this point. Lord Talbot permitted an assignee to exercise this right of set-off (1); — but Lord Hardwicke refused to do so, saying, that he would not allow the assignee (who was an officer of the commission) to stop a person's share in the dividends, on account of his own private debt owing to him from that person; for that he had his remedy at law, and ought not to blend his own private affairs with the commission, to which he was only a trustee. (2) And in a recent case before Lord Eldon, where one of two assignees claimed to set off a private debt of his own against the dividend; — upon a petition that the *assignees* might be ordered to pay the dividend, Lord Eldon would not allow the set-off, on the ground that the dividend was due *from two* assignees, and the debt only due *to one*; — but he made no observations on the previous decisions. (3)

*First dividend.*

can set off a dividend against a debt due to himself.

Where a banker to the estate, being also a creditor of the bankrupt, becomes bankrupt himself, his estate is not entitled to any dividend on his debt proved under the commission, until the whole monies received by him, as banker to the estate, have been (4) accounted for.

Where the banker to the estate becomes bankrupt.

Neither an assignee, nor the solicitor under the commission, is permitted to purchase a dividend for his own benefit. (5)

As to purchasing a dividend.

The Lord Chancellor cannot, in a proceeding by *bill*, reverse the order of the commissioners for a dividend, the only course being by *petition* in bankruptcy. (6)

How order of dividend to be reversed.

(1) *Ex parte Nockold*, 1 C. B. L. 522.

(2) *Ex parte White*, 1 Atk. 90.

(3) *Ex parte Bruce*, Whitm. B. L. 315.

(4) *Ex parte Bebb*, 19 Ves. 223.

(5) *Ex parte James*, 8 Ves. 350.

(6) *Clarke v. Capron*, 2 Ves. jun. 668.

## SECTION II.

*Of the second and the final Dividend.*

When  
meeting to  
be ap-  
pointed.

Second  
dividend  
to be final,  
except  
when.

When  
creditors  
proving at  
meeting  
for second  
dividend  
may re-  
ceive the  
former.

By *section* 109, if the bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners are directed, within eighteen calendar months after the issuing of the commission, to appoint a public meeting (of which twenty-one days' previous notice is also to be given in the Gazette), to make a second dividend of the bankrupt's estate, when likewise all creditors may prove their debts, who have not previously proved them. The commissioners are then, after auditing the accounts of the assignees, (as directed by the 106th *section* (1)) to order the balance in their hands to be forthwith divided amongst such of the creditors as shall have proved their debts; and such second dividend is directed to be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out, or not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees; in which last cases they are directed, as soon as may be, to convert such estate and effects into money, and within two calendar months after the same shall be so converted, to divide the same in manner before mentioned.

When creditors prove their debts in the first instance at the meeting for the second dividend, it must be upon the terms of not disturbing the former dividend; but it is incumbent on them to explain why they have not sooner proved, and if they can reasonably account for the delay, they will then be admitted to a participation in the former dividend, before the commissioners proceed to make a second. (2) This indulgence was not formerly granted, it

(1) See ante, pa. 327.

Ex parte *Stiles*, 1 Atk. 208. In re

(2) Ex parte *Long*, 2 Bro. 50. *Wheeler*, 1 Sch. & Lef. 242.

being considered, that creditors (who had not proved before a dividend) could only be paid *future dividends pari passu* with the rest of the creditors. The strict and regular mode, of being admitted to receive former dividends is, by petition to the Lord Chancellor (1); but it is the practice for the commissioners, without an order, first to direct the creditor to be paid the former dividend, and then to direct a general distribution of the residue of the bankrupt's effects. (2) When the assignees pay former dividends to any creditors subsequently proving, without the order of the Lord Chancellor, they must also pay them to every other creditor in the same situation. (3)

*Final dividend.*

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### SECTION III.

#### *Of unclaimed Dividends.*

By section 110. it is provided, that an account of all unclaimed dividends to the amount of 50% remaining in the hands, or in the order and disposition of the assignees, shall be filed in the bankrupt office within six months after the act shall have taken effect, or within two calendar months after the expiration of one year from the declaration and order of payment of such dividends. The account must contain the names of the creditors, to whom such unclaimed dividends are due respectively, as well as the amount of such dividends; and it must be signed by the assignees, and attested either by the solicitor to the commission, or the solicitor to the assignees. In default of the assignees rendering such account, they are chargeable with 5 per cent. interest upon such unclaimed dividends, to be computed from the time that the account is directed to be filed, for so long as such dividends shall be retained,

Assignees must file an account of them at the bankrupt office;

or liable to a penalty.

(1) *Ex parte Long*, 2 Bro. 50.

(3) *Ex parte Long*, 2 Bro. 50.

(2) 1 C.B.L. 521.

*Unclaimed dividends.*

How to be invested.

When proof of creditor void *pro tanto*.

and with such further sum, not exceeding in the whole 20l. per cent. per annum, as the commissioners shall think fit.

The Lord Chancellor, or the commissioners, may order the investment of any unclaimed dividends in the public funds, or any government security, for and on account of the creditors entitled, and subject to the order of the Lord Chancellor, who, if he shall think fit, may (after the same shall have remained unclaimed for the space of three years from the declaration of such dividends by the commissioners) order the same to be divided amongst the other creditors; and the proof of the creditors, to whom such dividends were allotted, will from thenceforth be considered as void *pro tanto*; renewable, however, as to any future dividends, so as to place them *pari passu* with the other creditors — but not to disturb any dividends which shall have been previously made.

#### SECTION IV.

##### *How a Dividend is to be recovered.*

The creditor might formerly, after a dividend was declared by the commissioners, either bring an action of assumpsit against the assignees for the recovery of it (1); or petition the Lord Chancellor for an order on them to pay it. (2) But, as assignees were frequently put to considerable expense and inconvenience in applying to the Lord Chancellor to stop proceedings at law, when there was an equitable defence to the claim of the creditor for the dividend, it was considered by Lord Eldon (3) (before indeed the passing of the recent statute), that there would be great convenience, in the creditor being confined to the exclusive jurisdiction of the Lord Chancellor; because then the legal

(1) *Brown v. Bullen*, Doug. 392.  
*Gillies v. Smith*, 1 C. B. L. 521.

(2) *Ex parte White*, 1 Atk. 90.  
*Bishop v. Church*, 3 Atk. 691.

(3) 1 Rose, 458.



demand, and the equitable opposition, would be considered and disposed of together. It is, therefore, now provided by the 111th section of the new act, that no *action* for a dividend shall be brought against the assignees; but if they refuse to pay any dividend, the Lord Chancellor may, upon petition, order payment thereof with interest for the time that it has been withheld, together with the costs of the application.

*How recoverable.*

Dividend only recoverable by petition.

This clause, however, does not enable the assignees to resist the payment of a dividend upon a debt duly proved under the commission, any more than they could formerly in an action at law; therefore, if there is any *objection to the debt*, upon which a petition is presented to be paid a dividend, the assignees should previously present another petition to the Chancellor to expunge or reduce the debt (1); or, at any rate, apply to the commissioners to do so (under the power given to them by the new act) (2) previous to the hearing of the petition of the creditor. For, upon any petition to pay dividends upon a debt proved, the order of dividend will be received as in itself establishing the petitioner's case; nor is it indeed a complete answer to the application, that a petition has been even presented by the assignees for the purpose of expunging the proof, and is in the Lord Chancellor's paper (3); though, if the assignees have really any equity to resist the payment of the dividend, the Lord Chancellor will in such a case either delay the order for the payment of the dividend (4); or if he makes the order, he will reserve the question of costs until the hearing of the petition by the assignees. (5)

The order of dividend sufficient to establish the petitioner's case.

The assignees are not justified in delaying the payment of dividends, on the ground that notice has been given them by a third person of a claim upon the dividends, if

When only delay of payment justified.

(1) *Ex parte Whiteside*, 1 Rose, 162. *Ex parte Atkinson*, 3 Ves. & 319. *Ex parte Loxley*, Buck, 456. B. 14.

*Ex parte Atkinson*, 3 V. & B. 13.

(4) *Ex parte Hodges*, Buck, 524.

(2) *Vide Section 60. ante*, 146.

(5) *Ex parte Whitwell. Ex parte*

(3) *Ex parte Whitwell*, 2 Rose, *Atkinson, supra*.

*How recoverable.*  
—

When creditor entitled to interest on dividend.

no petition has been presented by such claimant within a reasonable period after such notice. (1)

A creditor is not entitled to interest upon his dividend under the above section of the act, unless he has actually *applied* to the assignees for the payment of it, and they have refused, or omitted, to pay it. (2)

(1) *Ex parte Alsopp*, 1 Mad. 603.

(2) *Wackerbath v. Powell*, Buck, 508.

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## CHAP. XIII.

## OF THE BANKRUPT.

SECT. 1. *Of the Duties of the Bankrupt, and herein of his Surrender.*

2. *Of the Examination of the Bankrupt.*

3. *Of the Bankrupt's Answers.*

4. *Of committing the Bankrupt, and of the Remedies for his Discharge.*

5. *Of the Bankrupt's Rights and Privileges:*

1. *Of his Privilege from Arrest.*

2. *Of his Maintenance during his Examination.*

3. *Of his Allowance under the Commission.*

4. *Of his Right to the Surplus.*

5. *As to his Right to acquire Property before obtaining his Certificate.*

6. *Of Actions at Law by and against an uncertificated Bankrupt.*

7. *Of Suits in Equity.*

## SECTION I.

*Of the Duties of the Bankrupt, and herein of his Surrender.*

AFTER a party is declared a bankrupt, the first duty required of him is, to surrender himself to the commissioners. For, by section 112. of the new act, if after such declaration he shall not, before three o'clock (1) upon the forty-second day (after notice thereof in writing left at his usual place of

Penalty incurred by a bankrupt not surrendering.

(1) The act does not specify whether A. M., or P. M.

**Surrender.** abode, or personal notice, in case he be then in prison, and after notice also given in the London Gazette of the issuing of the commission, and of the meetings of the commissioners) surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them from time to time upon oath, (or, being a Quaker, upon solemn affirmation) — he is liable to be convicted of felony, and may be transported for life (1), or for a term not less than seven years; or he may be imprisoned and kept to hard labour, for any term not exceeding seven years.

Bankrupt, when in prison, may be brought before the commissioners.

If the bankrupt is in prison under any process or sentence, and is desirous to surrender, the new statute provides (2), that he may be brought before the commissioners (by their warrant directed to the gaoler) at the expense of the estate. (3) And, where a bankrupt in prison for debt is entitled to be carried before the commissioners to enable them to take his surrender, an order will be made for his doing so, notwithstanding he may upon a summary application obtain his discharge. (4)

Lord Chancellor may enlarge the time for the bankrupt's surrender.

By *section 118.* of the new act, the Lord Chancellor may enlarge the time for the bankrupt's surrender for such period, and as often as he shall think fit (5), so as the order for such enlargement be made six days at least before the day, on which the bankrupt ought to have surrendered. (6) The application for this purpose is made by presenting a short petition to the Lord Chancellor, and the order is drawn up at the bankrupt office, without mentioning it in court.

(1) The punishment of death, which was inflicted by the former statutes (4 & 5 Ann. 5 G. 1. 5 G. 2. c. 30. s. 1.) for not surrendering to a commission, was abolished by the 1 G. 4. c. 115., and that of transportation substituted.

(2) *Section 119.*

(3) And see *Spence v. Jones*, 5 B. & A. 705. Before the 49 G. 3. c. 121., if the bankrupt was in execution, the commissioners had no

authority to order him to be brought before them, but were obliged to take his surrender in prison.

(4) *Ex parte Emery*, Buck, 527.

(5) Under the 5 G. 2. c. 30. s. 3. the Lord Chancellor could only enlarge the time for fifty days, and there could only be one such enlargement.

(6) And see *ex parte Du Frene*, 1 Rose, 311.

The assignees, however, ought not to apply for such an order, if the bankrupt is ready and willing to surrender. (1) **Surrender.**

The bankrupt may surrender, if he chooses, at a private meeting of the commissioners at any time before the forty-second day; and it is his interest as well as his duty to surrender as early as possible; for, by doing so, he will be entitled to protection from arrest until he has passed his last examination. (2) But, though the bankrupt choose not to surrender until the very last minute of his time, the commissioners have, nevertheless, authority to summon and examine him in the intermediate period, touching his estate and effects. (3) **Bankrupt may surrender before the 42d day.**

If the bankrupt does not surrender himself within the limited time, namely, before three o'clock on the forty-second day, and has obtained no order for his surrender being enlarged, he is warned to surrender by the messenger in the usual form of proclamation. But the omission to surrender must be *wilful*, in order to render it a felony (4); for an involuntary neglect in this respect will not subject him to the penalty inflicted by the statute. Therefore, where the bankrupt makes an attempt to surrender, and is not able to do so, by the commissioners neglecting to attend (5) — or if he is prevented from surrendering by illness (6), — the omission to do so, not being intentional, does not of course become a felony. And the same, where the bankrupt went abroad to recover a debt due to his estate, and took his passage for his return in the only ship bound for England, which did not arrive in time. (7) When the bankrupt is prevented from surrendering by any accident of this kind, the Lord Chancellor will (upon his application, or that of the assignees, accompanied by an **Consequences of omission to surrender.**

**Must be wilful to render it a felony.**

**When Lord Chancellor will order a fresh**

(1) Ex parte *Dayrie*, 1 G. & J. 281.

(2) Ex parte *Wood*, 1 Rose, 46. 18 Ves. 1. *Rex v. Perrott*, 2 Burr. 1124.

(3) Section 36.; and see ante, page 148.

(4) Ex parte *Rogers*, Ambl. 307. Ex parte *Sherman*, cit. ibid.

(5) Ex parte *Grey*, 1 Ves. jun. 195.

(6) Ex parte *Bould*, 2 Bro. 49. Ex parte *Ricketts*, 6 Ves. 445.

(7) Ex parte *Higginson*, 12 Ves. 496.

**Surrender.** meeting to take the surrender.

In some cases the commission will be superseded to prevent a prosecution.

affidavit of the bankrupt) order the commissioners to appoint a fresh meeting to take his surrender. (1) And where a bankrupt had been erroneously advised by his solicitor, that the commission could not be sustained, and that his surrender was therefore unnecessary — and had, in reliance on that opinion, omitted to surrender, — a similar order was obtained (2); and the same, where his omission to surrender arose from an apprehension of a prosecution. (3) In another case of this description, where a subsequent joint commission was issued, Lord Eldon superseded the first commission (4); and Lord Macclesfield, too, in more instances than one — where there did not appear to be any intention in the bankrupt of defrauding his creditors by not surrendering within the time, and where his absence proceeded from an ignorance of the consequences, or from accident — superseded the commission, in order to prevent a prosecution. (5) But this will not be done, where no circumstances of *extenuation* appear (6); and in all cases of this nature, the bankrupt pays the costs of the application. (7) If, however, the omission to surrender has not proceeded from ignorance of the consequences, but has been purely wilful on the part of the bankrupt, the Lord Chancellor will not then interfere by making any order (8); and Lord Thurlow even refused to make one, where the bankrupt stayed abroad at the desire of the assignees to get in his effects. (9) Where the Lord Chancellor, by thus superseding the commission, exerts his authority to impede the ordinary course of law, — the same facts, which are sufficient to induce him to do so, will also, as it should seem, be a good defence to an indictment against the bankrupt for the felony. (10)

(1) See the four last cases.

(2) *Ex parte Shiles*, 2 Rose, 381.

(3) *Ex parte Berryman*, 1 G. & J. 223.

(4) *Ex parte Lavender*, 1 Rose, 55. 18 Ves. 18.

(5) *Ex parte Wood*, 1 Atk. 222.

(6) *Ex parte Roberts*, 2 Rose,

378.

(7) *Ex parte Carter*, 4 Madd. 594.

(8) *Ex parte Smith*, 1 C. B. L. 434. and the preceding cases.

(9) *Ex parte Dawson*, 2 Cox, 48.

(10) 1 C. B. L. 436.

In all these cases, where the Chancellor makes an order for a fresh meeting to take the bankrupt's surrender, though the order will not absolutely protect the bankrupt from a prosecution, yet it will be considered as a declaration of the Lord Chancellor's opinion, that the bankrupt had no intention of keeping out of the way *fraudulently*; for otherwise it would not (of course) have been granted. (1) Where the bankrupt was prosecuted by a person, who was not a creditor, for not surrendering, and the circumstances of the case were in his favour, Lord Hardwicke refused to aid the prosecution, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission; and said, he would leave the prosecution to go on in such manner, as the law prescribed, to prove him a bankrupt and a felon, within the intent and meaning of the statute on which the prosecution was grounded. (2)

*Surrender.*

How Lord Chancellor's order to be construed.

A petition for an order, to enlarge the time for a bankrupt's surrender, must always be supported by an affidavit of the bankrupt himself. In only one instance, it is said, has this rule been dispensed with; and that was, where the bankrupt was coming to surrender to the commission, but was taken and detained as a prisoner by the French, and consequently could not make an affidavit. (3) The consent of the assignees is not necessary previous to the bankrupt applying for the order; which, in fact, has been made upon one occasion, where the bankrupt's express object in surrendering was, that he might be enabled to petition to supersede the commission. (4)

Petition to enlarge the time must be supported by an affidavit of the bankrupt.

Before the bankrupt has surrendered to his commission, it is a strict rule (5), that he cannot be heard upon petition;

Bankrupt must surrender

(1) *Ex parte Johnson*, 14 Ves. 40. *Ex parte Jackson*, 5 Ves. 119. *Ex parte White*, 2 Bro. 47. *Ex parte Ricketts*, 6 Ves. 445. *Ex parte Shiles*, 2 Rose, 381.

(2) *Ex parte Wood*, 1 Atk. 222.

(3) *Fuller's case*, 10 Ves. 185.

(4) *Ex parte Shiles*, 1 Mad. 248. 2 Rose, 381.

(5) This rule, however convenient it may be in point of practice, it is impossible to deny, must in some cases appear inconsistent and unreasonable;—for it compels a party to submit, in a certain degree, to the very authority, which he contends to be invalid—and the validity of which (without

**Surrender.**

before he  
can be  
heard on  
petition.

and his representatives, in case of his death before surrender, are not in a better situation — unless, indeed, their petition makes out a case, that would induce the Court to permit a surrender if the bankrupt were living. (1) Therefore, where a bankrupt died abroad without having surrendered — and his personal representative petitioned, that the assignees might account for the surplus of his estate, as all other creditors had been paid 20s. in the pound; — the Vice-Chancellor dismissed the petition, saying, that if the petitioner had any equity, he must apply to the Court by *bill*. (2)

**Other  
duties.**

Besides the first and more important duties of the bankrupt — in surrendering himself to the commissioners, and making a full disclosure and discovery of his estate and effects — there are other specific duties imposed upon him by law during the working of the commission, to enable his assignees to collect his effects, and divide them amongst his creditors.

**Bankrupt  
must de-  
liver up his  
books and  
papers,**

**and attend  
his assign-  
ees to  
make out  
his ac-  
counts,  
&c.;**

Thus, by *section* 116. of the new statute, the bankrupt (if thereunto required) must deliver up to the assignees upon oath all his books of account, papers, and writings relating to his estate, and discover such as are in the custody or power of any other person: and he must at all times, if not in prison or custody, attend his assignees upon every reasonable notice in writing given to him, and assist them in making out the accounts of his estate: and, even after he has obtained his certificate, he is required, upon demand in writing, to attend his assignees to settle any accounts relating to his estate, as well as any court of record, to give

any such previous surrender) it is competent for him to contest, either in a *civil action*, or a *criminal prosecution*. Sir W. Evans thinks, that the surrender should be dispensed with, whenever the opposition of the bankrupt to the commission appears to arise from a fair and real objection to its validity, and not from any vex-

atious or improper motive; (see Letter to Romilly, page 201.) an arrangement which, it is submitted, would be not a very inequitable relaxation of the above inexorable rule.

(1) *Ex parte Crouther*, Bock, 480.

(2) *Ex parte Gardiner*, Bock, 458.



evidence touching the same, and also to do any act necessary for getting in his estate; for which attendance he is entitled to five shillings (1) per day from the assignees out of his estate. And if he shall not attend, or on attendance refuse to do any of such matters, (without sufficient excuse shewn to the commissioners for such refusal) the commissioners may, on the complaint of the assignees upon oath, cause the bankrupt to be apprehended on their warrant, and committed to prison until he shall conform to the satisfaction of the commissioners, or of the Lord Chancellor.

And at all times, till the bankrupt's affairs are finished, it is his duty, when required, to attend the commissioners, (whether before, or after he has obtained his certificate) to answer any questions which may be demanded of him relating to his estate or effects. (2)

#### *Duties.*

allowance  
for his at-  
tendance.

In case of  
default,  
may be im-  
prisoned.

Duty at all  
times to  
attend the  
commis-  
sioners.

## SECTION II.

### *Of the Examination of the Bankrupt.*

The bankrupt, as we have already seen (3), by the 112th section of the act is required to *submit* to be examined before the commissioners from time to time upon oath; and if upon such examination he shall not discover all his real or personal estate, and how, and to whom, upon what consideration, and when, he disposed of, assigned, or transferred, any of such estate, and all books, papers, and writings relating thereunto, (except such part as shall have been really and *bonâ fide* before sold, or disposed of, in the way of his *trade* (4), — or laid out in the

Bankrupt  
required  
to dis-  
cover all  
his estate  
and effects.

(1) This allowance was before only 2s. 6d.

(2) Section 36. *Norris v. Levy*, 1 Blac. 1188.

(3) Ante, 507. and see Section 36.

(4) This exception is copied from the 5 G. 2. c. 30. s. 1.; — and Mr. Cullen, in his able treatise on the former bankrupt laws, very

judiciously remarks, that there seems to be some inaccuracy with respect to the first part of the exception, if considered (as it is expressed in the statute) to be an exception merely as to *discovery*. The meaning, he says, of the latter part of the exception is obvious, viz. that a general account of the

*Of the examination.*

Penalty in case of concealment, or embezzlement.

As to refusal to answer questions.

Commissioners may examine bankrupt on oath,

ordinary expense of his family) — or if he shall not, upon such examination, deliver up to the commissioners all such part of his estate, and all books, papers, and writings relating thereto, as are in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children) — or if he shall remove, conceal, or embezzle any part of his estate, to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, — every such bankrupt “*in case of any default or wilful omission*” (1) in any of these particulars, will be deemed guilty of felony, and liable to be transported, or imprisoned, for the same term (2), as in the case of his not surrendering to the commission.

When the bankrupt had surrendered to his commission, it was decided, before the new act, that the *mere refusal* to answer certain questions, would not render him liable to be convicted of felony, notwithstanding such refusal proceeded from an intent to defraud his creditors. (3) But now, if those questions were connected with the discovery of his estate and effects, his refusal to answer them would, it should seem, be evidence of his intent to defraud his creditors, by retaining, concealing, or embezzling his property, within the meaning of the above section.

The commissioners may also (as we have already seen (4)) by the 36th *section* of the new act, at any time, either before, or after, the bankrupt has obtained his certificate (5),

gross sums laid out in family expenses is sufficient, without its being necessary to go into the particular items. But to dispense with the discovery of such part of his estate and effects, as shall have been *sold* in the way of *trade*, seems unintelligible in itself, and inconsistent with the other parts of the clause. The exception was found for the first time in the 5 G. 2., which, he thinks, is not the only instance of a variation without improvement from the

former statute of the 5 G. 1. See Cull. Princ. B. L. 343.

(1) The learned framer of the new act says, that these words should have been inserted, but have been, by some mistake, omitted, in the printing of the statute. Eden, B. L. 360. n. (d).

(2) The punishment was death under the 5 G. 2. c. 30.

(3) *Rex v. Page*, 1 B. & B. 308. 3 Moore, 656. 7 Price, 616.

(4) Ante, page 149.

(5) See 14 Ves. 449. *Ex parte Bradley*, 1 Rose, 202.

examine him upon oath, either by word of mouth, or on interrogatories in writing, touching all matters relating to his trade, dealing, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his estate or effects, and to reduce his answers into writing, which the bankrupt is required to sign. And if he shall refuse to answer any such questions of the commissioners, or not fully answer to their satisfaction, or shall refuse to sign his examination, the commissioners may then commit him by their warrant to prison without bail, until he shall submit himself to their authority.

*Of the examination.*

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and imprison him if he does not fully answer.

By section 118. the commissioners may now, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, *adjourn* such examination *sine die*; in which case the bankrupt will be free from arrest or imprisonment for such time (not exceeding three calendar months) as they shall, by indorsement upon the summons, appoint. (1) It is irregular in the assignees to get an *ex parte* order to enlarge the time for the bankrupt's last examination (2); but it seems that in one case such an order was made — the assignees consenting — though the bankrupt had absconded *after surrendering* to the commission. (3)

Commissioners may adjourn the examination.

The better to enable the bankrupt to finish his examination, he may (by section 116.) at all seasonable times after he has surrendered, and before the expiration of the forty-two days from the issuing of the commission, or before the expiration of such further time as shall be allowed him to finish his examination, inspect his books, papers, and wri-

Bankrupt may inspect his books, &c.

(1) And see *Rex v. Perrott*, 2 Burr. 1192. *Davis v. Trotter*, 8 T.R. 475. *Ex parte Hawkins*, 4 Ves. 691.

(2) *Ex parte Dayrie*, 1 G. & J. 281.

(3) *Ex parte Paor*, 1 Mont. Dig. 113. Quære, whether (under the words of the 112th section) a bankrupt could in such a case be convicted of felony, the first part of

the section (which relates to the surrender, the signing such surrender, and submitting to be examined) being entirely copulative, and constituting one entire duty, the *whole of which*, according to the principle of *Rex v. Page*, ante, 514. must be *omitted*, in order to render him liable to a conviction for felony.

*Of the examination.*  
 —

tings in the presence of his assignees, or any person appointed by them, and bring with him, each time, any two persons to assist him. And the assignees cannot refuse the bankrupt such an inspection of his books, whatever his object may be; for neither they, nor (as it seems) even the Lord Chancellor, have any discretion either to permit or refuse such inspection. (1)

Bankrupt must deliver in a statement of his accounts.

If the bankrupt is in prison, he may, as has been already stated (2), be brought before the commissioners to be examined; and the assignees may appoint any persons to attend him from time to time, and to produce to him his books, papers, and writings in order to prepare an abstract of his accounts, and a statement to shew the particulars of his estate and effects previous to his final examination and discovery thereof, a copy of which the bankrupt is required to deliver to the assignees ten days, at least, before his last examination.

Bound to answer all questions of commissioners.

Where the bankrupt's books were in the office of a Master of the Court of Chancery in Ireland, and the assignees required the production of them, the expense of procuring them was ordered to be paid out of the estate. (3)

The bankrupt is bound to answer all the questions of the commissioners relating to his property; and the whole of his conduct and behaviour in his dealings with it is subject to the strictest inquiry; for it is the duty of the commissioners to take care of the interests of all parties, and to examine the bankrupt fully, as to every matter connected with the disposal of his estate or effects. (4) And it seems to be contemplated by the legislature, that the bankrupt shall furnish to the commissioners at his last examination some *written* disclosure or discovery of his estate and effects; the uniform practice has been, certainly, conformable to this construction, — it being usual for the bankrupt to give

(1) *Ex parte Ross*, 1 Rose, 33. 17 Ves. 574.

(2) *Ante*, page 508.; and see *Section 119*.

(3) *Ex parte Cridland*, 2 Rose, 164. 3 Ves. & B. 94.

(4) *Nerot v. Wallace*, 5 T.R. 17. *Janson v. Wilson*, Doug. 257. *Taylor's case*, 8 Ves. 331.

in then some account in writing to the commissioners. This account should specify what debts are due *from* him, and what effects he then possesses, in addition to debts which are due *to* him, — what he has expended, — what his capital was, — and how that has been laid out, so as to account for the reason of his becoming a bankrupt. (1)

*Of the examination.*

The Lord Chancellor has, however, the *power* in his discretion to limit the examination of the commissioners to particular points, though such a power does not appear to have been exercised in the examination of the *bankrupt*; nor, indeed, does there seem any great necessity for the interposition of the Chancellor's authority in this respect. For if the bankrupt objects to any question, he may demur to the interrogatories, and the Lord Chancellor will then judge of the question upon a petition. (2) And, if the commissioners are dissatisfied with any of the bankrupt's answers, and commit him in consequence, the Lord Chancellor, or any other of the superior tribunals, can in that case, upon *habeas corpus*, decide both upon the propriety of the question and the answer. Lord Hardwicke, in one case (3), made an order for limiting the examination of a person summoned before them (who was the mother of the bankrupt) to the point of the bankrupt's *trading*; but, in another case, he refused to restrain the commissioners from asking *certain questions* of a person so summoned. (4)

As to power of Lord Chancellor to limit examination.

The examination of the bankrupt is not to be restrained, because his answers may subject him to certain penalties, which he has incurred by his conduct in particular transactions (5); and it has been said that he cannot refuse to answer the inquiries of the commissioners, although his answers may *tend* to shew that he has committed a criminal act. (6) But he cannot, certainly, object to answer a question, because

As to compelling an answer from bankrupt, which would criminate himself.

(1) Per Abbott C. J. *Davie v. Mitford*, 4 B. & A. 365.

(4) Ex parte *Bland*, 1 Atk. 205.

(2) Ex parte *Meymot*, 1 Atk. 199.

(5) Ex parte *Meymot*, supra.

Ex parte *Barr*, 1 C. B. L. 437.

(3) Ex parte *Parsons*, 1 Atk. 204.

(6) Ex parte *Cossens*, Buck, 531.

*Of the examination.*

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the answer would tend to establish an act of bankruptcy. (1) Nor can he refuse to answer the inquiries of the commissioners, on the ground that the creditors can derive no benefit from the examination (2), or that he intends to dispute the commission. (3) But, if the question put to him be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it. Therefore, where a petition prayed, that the creditors might be at liberty to examine the bankrupt, whether he, or any person in trust for him, or for his benefit, had received, or were to receive, any sum of money, or other valuable consideration, for his having resigned, or as an inducement to resign, the office of town-clerk of the city of Bristol, — the petition was dismissed. (4)

Assignees have no power to stop the examination as to certain points.

The assignees, too, have no power by an agreement with the bankrupt, or any other person, (though made with the consent of all the creditors) to stop the commissioners from examining the bankrupt as to certain points; — for the public, as well as the creditors, have a right to know how the bankrupt has disposed of his property. The creditors are only interested, as far as respects the payment of their debts; but the public are interested in knowing, whether the bankrupt ought to be restored to his former credit by obtaining his certificate. Therefore, where an agreement was made by a friend of the bankrupt, to pay a sum of money to the assignees, in consideration that they would forbear to proceed in the examination then about to be taken before the commissioners, with respect to certain sums of money, for which the bankrupt had not accounted — and that the commissioners would forbear and desist from taking his examination to these points, — such agreement was held void, as being contrary to the object and policy of the bankrupt law. (5)

(1) *Pratt's case*, 1 G. & J. 58.

(4) *Ibid.*

(2) *Ex parte Nowlan*, 11 Ves. 516.

(5) *Nerot v Wallace*, 3 T.R. 17.

(3) *Davie v. Mitford*, 4 B. & A. 366.

But an agreement, by a friend of the bankrupt, to pay all the creditors their *full debts*, in consider-

## SECTION III.

*Of the Bankrupt's Answers.*

The bankrupt being, as has been already stated (1), bound to answer *fully* any questions put to him by the commissioners, touching any matter to which he may be lawfully examined, — when he is required, therefore, to account for the disposal and application of large sums of money, and questions are put to him, which call for, and will admit of, full and particular answers, general answers will not be sufficient. For the better illustration of what is, and what is not, an insufficient answer in this respect, two or three cases will be given at somewhat greater length, than the scope of this work has in general admitted of: —

When questions admit of full and particular answers, general answers will not be sufficient.

John Perrot upon his examination had the following question put to him: “As you admit, that you have spent the last week previous to your examination with Mr. Maynard (one of your assignees) to settle and adjust your accounts, and to draw up a state thereof, to enable you to close such your examination; and do likewise admit, that upon such state thereof it appears, that, after giving you credit for all sums of money paid by you, and making you debtor for all goods sold and delivered to you, from your first entering into trade to the time of your bankruptcy, there is a deficiency of the sum of 13,513*l.*; — give a true and *particular* account of what is become of the same, and how and in what manner you have applied and disposed thereof.” To this question the bankrupt refused to give any other than the following *general* answer: “On goods sold this last year I have lost

*Perrot's case.*

ation that they would not proceed any further under the commission, and would join in an application to the Lord Chancellor to have it superseded, was held legal, and not contrary to the policy of the bankrupt law. *Kaye v. Bolton*, 6 T.R. 134. (1) Ante, pages 149. 515.

*Of the  
bankrupt's  
answers.*

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“ upwards of 2000*l.*; and by mountings, I have lost up-  
wards of 1000*l.*; and for nine or ten years I have (and  
I am sorry to say it) been extremely extravagant, and  
*spent large sums of money.*” The Court of King’s Bench held this to be a proper question, and the answer very insufficient (1) and unsatisfactory. The bankrupt, however, was afterwards (at his own instance) again brought before the commissioners; and, upon the same question being proposed to him, he particularised a woman upon whom he had spent 5000*l.* from December 1758 to December 1759, and also specified the times of sending and giving it to her; but stated that no person was privy to this, and that the woman, whose name was Sarah Powell, otherwise Taylor, was dead, as he had heard; that she knew him to be a bankrupt, and never returned the money or any part of it to him; and that he gave it to her for her maintenance and expenses, and not for a fund for her future support, or wherefrom he could draw any advantage; that he knew in the year 1759, when he gave and remitted those sums to her, “ that he was not worth any thing, and “ that he was remitting to her the money of his creditors;” that he was acquainted with her five or six years, but he could not recollect what he gave her, or spent upon her during the second, third, or fourth years of their acquaintance; nor did he keep any further account or memorandum thereof, either in those years, or in the year 1759, but that he spoke from memory only; that he did not take any of this money from his banker, but always took it from Mr. Thomson (since deceased), who used to sell goods for him; and that all letters between him and this woman, except one or two, were burnt or destroyed:— the Court held this answer also incomplete and unsatisfactory, and ordered the bankrupt to be remanded. (2)

Bankrupt  
may an-  
swer “ to

A bankrupt, however, may answer *to the best of his remembrance and belief*; and if he swears that he cannot

(1) *Rex v. Perrot*, 2 Burr. 1122. 1215.; see also *Langhorn’s case*,

(2) *Rex v. Perrott*, 2 Burr. 2 Blac. 919.



positively answer farther, it will be sufficient. (1) What is a sufficient answer of this nature will be best explained by an able judgment of Lord Chief Justice De Grey's, in which he gives a lucid definition of the different grounds of recollection and belief. The questions put to the witness in this case were, first: "Did you purchase by a broker the two bales of silk?" Answer: "I cannot positively recollect whether I bought them of a broker, or not." Secondly: "Can you form any belief whether you bought them by a broker or not?" Answer: "I should rather believe I bought them by a broker." Thirdly: "Whether, or not, do you believe you bought the two bales of silk by a broker?" Answer: "I cannot give any other answer than I have already given; viz., I cannot positively recollect, &c., but I rather believe I did." Fourthly: "Whether by the words 'I should rather believe I bought them by a broker,' you mean, that you do believe the two bales of silk were bought by a broker; or whether you mean to say, you believe that the said two bales of silk were *not* bought by a broker?" The witness refused to answer this last question; and the commissioners committed him. Upon being brought up before the Court of Common Pleas by *habeas corpus*, Lord Chief Justice De Grey said: "In the present case the witness had only two ways, or means, to enable him to answer the question put to him, either by *recollection*, or *belief*; the first is *knowledge*, and must imply *consciousness*; but in some cases no traces of a fact remain in a man's memory, whereby he can recollect the fact; it is possible he may have lost all knowledge of it; and if he has, he can only answer that he doth not *know*, or cannot recollect the fact. A man may recollect to a certain degree, and though he cannot recollect at one time, he may at another. Suppose I may not, or cannot, *recollect*—yet I may and can *believe* I did a certain act, because you tell me, you saw me do it;—

Of the bankrupt's answers.

the best of his remembrance and belief."

(1) *Perrot v. Ballard*, 2 Ch. Ca. 72.

Of the  
bankrupt's  
answers.

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“ then I *believe* I did it, because I give credit to you as a  
 “ person of veracity. How is it in courts of justice,  
 “ when a man swears that he neither *recollects*, nor *believes*,  
 “ that he did such an act; or that he did, or did not, do  
 “ it to the best of his *knowledge, remembrance, and belief*?  
 “ This is certainly a full answer. A subscribing witness  
 “ to a bond may swear, that he has totally forgot he sub-  
 “ scribed his name as a witness to it, and that he cannot  
 “ swear positively, that he saw the obligor seal and deliver  
 “ the bond; but, seeing his own hand-writing subscribed  
 “ as a witness to the execution of it, he may swear he *be-*  
 “ *lieves* he saw the obligor execute the bond; and such  
 “ answer would be satisfactory to the Court. Suppose a  
 “ banker was upon examination asked, whether he paid  
 “ such a bill in cash or notes — and he answers he cannot  
 “ tell, but his books may inform him; if, on looking into  
 “ his books, he sees by the hand-writing of his clerks, that  
 “ the bill appears to have been paid in cash, or notes, he  
 “ then swears to his belief accordingly; but if his books  
 “ be lost or destroyed, and his clerks are dead, or gone,  
 “ and he then swears he cannot tell, or doth not know,  
 “ whether the bill was paid in cash, or notes, his answer  
 “ is full, and ought to be taken as satisfactory. So a mer-  
 “ chant buying many goods may have forgot, and cannot  
 “ *recollect*, or be able to swear, whether he bought a certain  
 “ particular parcel and sort of goods by himself, or a  
 “ broker.” The Court, therefore, in this case, held the  
 above answers of the bankrupt to be sufficient; for, as upon  
 the second answer, the witness would be liable to be con-  
 victed of perjury, if it could be proved that he himself  
 bought the silk, and not a broker, — he had, consequently,  
 sworn to a degree of *belief* sufficient to answer civil pur-  
 poses. (1)

A positive  
answer  
not neces-

It was formerly held by Lord Mansfield, that if a bank-  
 rupt swear fully and roundly, — though the commissioners

(1) *Miller's case*, 3 Wils. 420. 2 Bl. Rep. 881.

have every reason to believe that what he swears is *not* true, yet they must take it to be satisfactory, provided it would be satisfactory, in case it *were* true; and that, though they are convinced he has perjured himself, yet, if he answers fully, they cannot commit him for false swearing. (1) But there seems to be little reason or principle in this decision; and it has since been completely overruled (2); — for it would, indeed, be a ridiculous ceremony which the commissioners would have to go through in examining a bankrupt, if they were bound to give credit to any account, however improbable or absurd, merely because he has the effrontery to swear to it. The question, therefore, in cases of this kind is, whether the answers given by the bankrupt be, or be not, sufficient to satisfy the mind of any reasonable man; for the rule does not hold now, that a *positive* answer must be taken to be satisfactory, — because the bankrupt may be indicted for perjury, if it is not true; but even an indictment for perjury cannot be supported, when the secret remains locked up in the bankrupt's own breast. (3) And this doctrine has been recognized by Lord Eldon in subsequent decisions, where it is laid down, that the commissioners may properly inquire into the motive of a bankrupt's conduct, with a view to see whether the motive he assigns is so improbable, that they cannot believe him; and that the bankrupt's answer must be *full* in this sense — that it must be reasonably satisfactory (4) to the mind that is to

*Of the bankrupt's answers.*

—  
sarily a satisfactory answer.

Rule as to sufficiency of answer.

(1) *Pedley's case*, Leach, 361.

(2) *Ex parte Nowlan*, 6 T. R. 118. of which case see the Record 2 Rose, 401.; and see 11 Ves. 511. *Taylor's case*, 8 Ves. 328. *Ex parte Oliver*, 1 Rose, 407. 2 V. & B. 244. *Ex parte Cassidy*, 2 Rose, 217. 19 Ves. 334. 2 Swanst. 76.

(3) Per Lord Kenyon, 6 T. R. 118.

(4) The judgments of mankind, however, as to right and wrong are found from experience to be so very different, and this too even

among the most reasonable men, that it must often become a matter of great difficulty to decide, what answer is, or is not, *sufficient to satisfy the mind of any reasonable man*; for, as Sir William Evans has well observed in his Letter to Sir S. Romilly, satisfactory and unsatisfactory answers approximate so nearly to each other, that the most acute legal metaphysics cannot supply a satisfactory criterion for distinguishing them.

*Of the  
bankrupt's  
answers.*

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decide. (1) When, however, a single question is followed by a direct answer, and is not afterwards followed up by any other examination respecting the transaction, which may have excited the suspicions of the commissioners, the answer must then be taken to be satisfactory. As where a bankrupt was asked: "Whether he had not six months previous to the commission executed two conveyances of his estate and effects, or part thereof, to his son?" and he answered: "Not to my knowledge." This answer was held satisfactory, no further questions having been put. (2)

*As to an-  
swering a  
question  
embodying  
a fact.*

Where a question is put to a bankrupt embodying as a fact, what he said, or did, on a preceding day; — if he does not deny that he said or did so, or does not qualify it, the bankrupt must be taken to admit the fact alluded to in the question; because he must know whether he said or did so, or not. (3) But his answering a question, embodying a statement relative to the acts of a *third person*, without denying or qualifying that statement, is not to be understood as admitting it. (4)

*Commis-  
sioners  
cannot de-  
legate  
their au-  
thority to  
take the  
bankrupt's  
answer.*

The commissioners cannot *delegate their authority* to the assignees, or any other person, to examine the bankrupt, and take his answer. For example, — a bankrupt was committed upon the following question and answer stated in the warrant of commitment: "You having stated to the commissioners heretofore, that if you were at liberty, and out of prison, you could find the several persons named by you in your balance sheet as debtors to your estate — and being directed by the commissioners to communicate to your assignees how, or where such, or any of such persons could be found; and T. C. (the assignee of your estate) having called upon you, and seen you in the Fleet prison for that purpose; — have you

(1) *Taylor's case*, 8 Ves. 328.;  
and see *ex parte Oliver*, 1 Rose,  
407. 2 Ves. & B. 244.

(2) *Norris's case*, 2 Jac. & W.  
437. *Walker's case*, 1 G. & J. 371.

(3) *Crowley's case*, 2 Swanst. 78.  
*Goddard's case*, 1 G. & J. 51. *Ex*  
*parte Nowlan*, 6 T. R. 118. *Res*  
*v. Perrot*, 4 Burr. 1122.

(4) 2 Swanst. 1.

"given him any such information? and if not, why not?"

Answer: "I have not, and can give no reason why?"

*Of the  
bankrupt's  
answers.*

The bankrupt having obtained a writ of *habeas corpus*, Lord Eldon held the commitment bad in substance, saying:

"If the bankrupt, answering to the direct questions of the commissioners, had said, he could not, or he would not, tell, they would then have been authorized to commit him. The commissioners, however, have done this: 'We do not ourselves examine you; but, you being in prison, (a circumstance, however, perfectly immaterial) we send the assignees to you, and now ask you, why you have not submitted to their examination, and answered to their satisfaction?' The answer is obvious; 'You have delegated persons incompetent to exact a submission, upon which you can commit.' The bankrupt is entitled to be discharged." (1)

#### SECTION IV.

*Of committing the Bankrupt, and herein of the Remedies for his Discharge.*

The commitment of the bankrupt by the commissioners, for not submitting to their authority, is a criminal process (2); and when such committal takes place, it must be by warrant under their hands and seals. (3) And by section 39. of the new statute, if the bankrupt be committed for refusing to answer, or for not fully answering,—the question put by the commissioners must be specified in the warrant, in order that the court, before whom the bankrupt may be subsequently brought, may judge whether it was a lawful question or not. But, though the present statute, like the former one (4), only directs the

When bankrupt committed, both the question and answer must be specified in

(1) *Ex parte Cassidy*, 2 Rose, 217.

(2) *Re Taylor*, 3 East, 232.

(3) Section 36., and see ante, page 515.

(4) 5 Geo. 3. c. 30. s. 17.

Of committing the bankrupt.

the warrant.

*question* to be specified, yet the courts have been hitherto very strict in requiring also the *answers* of the bankrupt, as well indeed as the whole of the examination connected with the cause of commitment, to be stated verbatim in the warrant, that they may be the better enabled to determine, whether the bankrupt's answers are satisfactory or not. (1) And it is probable, that the courts will still require such answers, as are applicable to the immediate cause of commitment, to be stated in the warrant. It must be remembered, however, that (before the new act) the *warrant* was the *only source*, from whence the judge could extract information, whereupon to form his opinion about the validity of the commitment (2); which (as Lord Eldon observed) rendered it the more necessary to set out the whole of the examination. But now, as the court or judge, either on an application for a *habeas corpus* (3), or on the trial of an action in respect of the commitment (4), (if required thereto by the party committed, or by the defendant in the suit) may inspect and consider the whole of the examination—a power which they did not possess before (5), — the learned framer of the new act thinks, that the necessity of setting forth the whole of the examination may be in future dispensed with. (6) The court or judge, however, is only authorised to look at the whole of the examination, “*if required by the party committed* ;” and, therefore, it would seem that, if upon application for a *habeas corpus*, the party committed does *not require* the court or judge to inspect the whole of the examination, the necessity of setting it forth in the warrant will exist as much as it did before the passing of the act.

Whether commissioners should be

In committing a bankrupt for not answering satisfactorily, it is doubtful, whether the commissioners should be influenced by extrinsic evidence; but if they are so in-

(1) *Goddard's case*, 1 G. & J. 55. *Coombes's case*, 2 Rose, 398. *Brown's case*, *ibid.* 400. *Crowley's case*, 2 Swanst. 80. *Tomlin's case*, 1 G. & J. 373.

(2) *Tomlin's case*, 1 G. & J. 373.  
(3) *Section 39.*  
(4) *Section 40.*  
(5) *Coombes's case*, 2 Rose, 399.  
(6) *Eden B. L.* 87.

fluenced, the evidence should be fully read over to the bankrupt, before they can call upon him for an answer to the questions proposed to him in his examination. (1) Therefore, where it appeared in a warrant of commitment, that the commissioners, in the questions put to the bankrupt, had stated facts, of which they were informed by the deposition of the messenger — but the deposition was not set forth in the warrant, nor did it thereby appear to have been read over to the bankrupt at the time of his examination, the *effect* of it being only stated in the warrant; — Lord Eldon held, that the commitment was substantially insufficient, and that this was not merely a defect in form. (2)

*Of committing the bankrupt.*

—  
influenced by extrinsic evidence.

When the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, or balance sheet, which he had frequently referred to, as the only mode of explaining his trade and dealings, and the last adjournment was made upon his assurance, that he would produce such account if further time was given;—the commissioners were held justified in committing him, when the account was not produced on the day to which the last adjournment was made, nor any satisfactory answer given by the bankrupt, explaining why it was not produced. (3)

What is a cause for commitment.

A single question followed by a direct answer, which question is unvaried in terms, and not followed up by any other examination respecting the transaction, which may have excited the suspicions of the commissioners, does not (as we have already seen) afford grounds for a valid commitment; for the judge, who may have afterwards to decide upon such commitment, has no means of determining whether the answer is satisfactory, or unsatisfactory. (4)

What is not a cause.

(1) *Crowley's case*, Buck. 264.  
2 Swanst. 1.

(2) *Ibid.*

(3) *Goddard's case*, 1 G. & J. 45.  
*Davie v. Mitford*, 4 B. & A. 356.

(4) *Walker's case*, 1 G. & J. 371.  
*Norris's case*, 2 Jac. & W. 437.;  
and see ante, 524.

*Of committing the bankrupt.*

Where there should be a supplemental warrant.

Where bankrupt refuses to be sworn, &c.

Warrant must pursue the words of the statute.

What is a bad conclusion.

Where a bankrupt, after being committed for not answering satisfactorily, is again examined by the commissioners, and remanded in consequence of his answers not being more satisfactory than at first, there ought to be a supplemental warrant of commitment or detainer, stating what had passed in the way of question and answer at such *second* examination; and where this was omitted, Lord Eldon thought it a substantial, and not a mere formal defect. (1) It is, however, no objection to a warrant, which recites several examinations, that it omits to mention that the bankrupt, who had been committed, was discharged at the conclusion of one of the (2) examinations.

And where the bankrupt, upon the commissioners preparing to administer an oath to him, refuses to be sworn, or to give any account of his property, the commissioners in this case need not in their warrant of commitment set forth any specific question; for this amounts to a refusal to answer all possible questions which can be suggested. (3) And when the bankrupt refused to be sworn, on the ground that his legal adviser had not arrived, and the warrant stated generally that he refused to be sworn, without adding the reason assigned by him for his refusal, that was held to be sufficient. (4)

As the statute only gives the commissioners the power to commit the party, *until* he shall submit himself to be sworn, or full answers make, to their satisfaction, to such questions as shall be put to him, or until he shall sign and subscribe his examination, the warrant of commitment (which is in restraint of the liberty of the subject) must strictly pursue the words of the statute in the conclusion of it, otherwise the bankrupt will be ordered to be discharged. A commitment, therefore, of a bankrupt under the 39th section, "*until he shall conform to the authority of the com-*

(1) *Coombes's case*, 2 Rose, 396.  
*Brown's case*, *ibid.* 400.

(2) *Bromley's case*, 2 Jac. & W. 455.

(3) *Ex parte Page*, 1 B. & A. 568.

(4) *Nobes v. Mountain*, 5 B. & B. 235. 7 Moore, 39.



*submitting* would be held bad; for though the word *conform*, instead of the word *submit*, might be well enough, being of the same sense, — yet the commissioners have *other authorities* besides that of *examining*, and it might not appear but that it required a submission to them in *other respects*. (1) So, also, a commitment “till he shall be discharged by due course of law (2),” or “for *misbehaviour* (3),” has been held bad; as well as one “for *prevarication* (4),” for he might prevaricate, and yet give a full answer at last. And a commitment, until he shall submit himself, “and full answer make to all such questions as may be put to him,” seems to have been on one occasion (5) thought insufficient; though in a recent case such a commitment was held (6) good, — the Court saying, that the questions must be intended to mean lawful questions. The proper conclusion, however, of the warrant seems to be, “until he shall submit himself to us, the said commissioners, and full answer make to the questions so put to him by us as aforesaid.” (7)

Of committing the bankrupt.

What the proper conclusion.

When the commissioners commit the bankrupt, for not attending his assignees (when required) to assist them in making out the accounts of his estate, (as they are empowered to do under the 116<sup>th</sup> section (8) of the new act,) the warrant must also pursue the words of the section giving them such power. In this case, they are authorised to commit, “until the bankrupt shall conform to their satisfaction.”

Where one of the reasons appearing upon the face of the commitment was illegal, although there was another set forth upon it which was good, yet, as the person was com-

Whether a commitment bad in part, is bad in toto.

- (1) *Bracey's case*, 1 Salk. 348. (5) *Miller's case*, 3 Wils. 428.  
 Comb. 391. *Bracey v. Harris*, 2 Bl. 881.  
 5 Mod. 309. (6) *Nobes v. Mountain*, 5 B. &  
 (2) *Hollingshed's case*, 2 Lord B. 233. 7 Moore, 39.  
 R. 851. *Rex v. Nathan*, 2 Str. 880. (7) *Miller's case*, supra. *Rex v.*  
 (3) *Miller's case*, 2 Bl. 882. *Perrott*, Burn. 1122.  
 2144. (8) And see ante, 512.  
 (4) *Rex v. Nathan*, supra.

Of committing the bankrupt.

As to time of making commitment.

When the answer would only tend to criminate the bankrupt. When he absolutely refuses to answer.

Where bankrupt applies for *mandamus* to be further examined.

Remedy for discharge by *habeas corpus*.

mitted until he should submit also in the matter in which the commissioners had no authority, the commitment was held illegal *in toto*. (1) But this decision may be considered as doubtful; for it has been said, that where one cause of the commitment was manifestly illegal, *that* perhaps might be rejected as superfluous, and the commitment be referred to that cause, which, if true, was a legal one. (2)

It is no objection to the commitment, that it is made in the absence of the bankrupt; or that it is made some days after the examination took place, notwithstanding it bears date on the day of the examination. (3)

Though a commitment of a bankrupt is illegal, (for not answering a particular question the answer to which would directly criminate himself) yet, if his answer would only tend to shew that he has committed a criminal act, it seems, that a committal would then be good for not answering the question. (4) And, if a bankrupt *absolutely refuse* to account for part of his effects, on the ground that his answer to the inquiries of the commissioners would criminate himself, he may, nevertheless, be legally committed for such refusal (5), on the ground that his answer is *unsatisfactory* within the language of the act.

In a recent case, where the bankrupt (who had been committed for not answering satisfactorily) applied for a *mandamus* to examine him, professing his readiness to make the disclosures required, the Court of King's Bench granted the writ — but directed that it should not issue without an order from a judge, after the bankrupt had suggested the grounds upon which he desired to be further examined, and the refusal of the commissioners to examine him. (6)

The proper remedy for the bankrupt to pursue, when he is illegally committed by the commissioners, is to apply

(1) *Ex parte James*, 1 P. Wms. 610.

(2) *Miller v. Seare*, 2 Bl. 1141.

(3) *Batty v. Gresley*, 8 East, 327. *Salt's case*, 13 Ves. 361.

(4) *Ex parte Cowens*, Buck, 531.

(5) *Ex parte Oliver*, 1 Rose,

407.

(6) *Bromley's case*, 3 Dow. & R.

310.

for a *habeas corpus*. (1) This writ may be moved for by him — as well as by any other party who is committed by the commissioners, and who thinks himself improperly dealt with; and it is returnable either before the Lord Chancellor, or any of the superior courts at Westminster in term time — or before any one of the twelve Judges in vacation. It was formerly supposed, that the Lord Chancellor could not issue the writ at common law in vacation (2); but in a late case Lord Eldon decided, that the Chancellor, as well as the Judges, had authority to do so. (3) And, whenever the writ is returnable before the Lord Chancellor, he exercises jurisdiction, not as sitting in bankruptcy, but as a law officer having a right to issue the writ. (4) Care should be taken, that a correct return is made to the *habeas corpus*; for on the application of the bankrupt's discharge, the Lord Chancellor will not go out of the return. (5)

*Of committing the bankrupt.*

Notice of the application for the writ of *habeas corpus* should, in general, be given by the bankrupt to the assignees; though there may be some cases, where the right to be discharged is so clear, that it may be done at once. Where notice, however, is necessary, a notice given on Saturday afternoon for Monday has been held insufficient. (6)

When notice should be given of the application.

The commissioners may, after the issuing of the writ of *habeas corpus* and before the return to it, make (if necessary) a fresh warrant, stating more fully the cause for detaining the bankrupt in custody; and such warrant may, by words of reference, incorporate the formal parts of the first warrant. (7)

Commissioners may make a fresh warrant.

When the *habeas corpus* is returned, the Court has to exercise its discretion, in deciding whether the answer of

(1) *Taylor's case*, 8 Ves. 330.

*Ex parte Tomkinson*, 10 Ves. 106.

*Ex parte Hyams*, 18 Ves. 237.

(2) *Jenks's case*, 7 Harg. St. Tr. 453.

467.

(3) *Crowley's case*, Buck, 264.

(4) 7 Ves. 425.

(5) *Crowley's case*, 2 Swanst. 75.

(6) *Bromley's case*, 2 Jac. & W.

(7) *Ex parte Page*, 1 B. & A.

568.

Of committing the bankrupt.

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As to affidavits in explanation.

When mere insufficiency in form, court will re-commit; except when.

Court may look at whole of the examination.

the bankrupt is satisfactory, or not; and if it believes the statement which the commissioners have disbelieved, it will, of course, order him to be discharged. (1) But the Court has no authority to receive *affidavits in explanation* of the party's conduct and answers before the commissioners, — but only to inquire into the validity of the cause of the commitment, as stated on the face of the return. (2) The Court will, therefore, not discharge a bankrupt, merely upon his producing affidavits, that he *had made* a discovery of his estate and effects, — when he was committed for not answering and making such discovery; for if the statement in the commitment be untrue, he may bring an action of false imprisonment. (3)

If, upon the return of the *habeas corpus*, any insufficiency appears merely in the *form* of the warrant, by its omitting to specify any question put by the commissioners, — the Court or Judge, before whom the party shall be brought, may (and is indeed required by the statute (4)) to recommit him, unless he can shew that he has fully answered all lawful questions put to him by the commissioners; or (if he was committed for refusing to be sworn, or for not signing his examination,) unless it shall appear to the Court, or Judge, that he had a sufficient reason for the same. And, as has been already observed (5), in case the whole of the examination shall not have been stated in the warrant of commitment, the Court or Judge is directed (if required thereto by the party committed) to inspect and consider the whole of the examination (6), whereof any such question was a part; and if it shall then appear, that the answer of

(1) *Ex parte Oliver*, 1 Rose, 407.

(2) *Ex parte James*, 1 Chit. Rep. 110.

(3) *Gregory's case*, 5 Mod. 368.; and see *Miller v. Seare*, 2 Bl. 1141.

(4) Section 39.; and see *Ex parte Page*, 1 B. & A. 568.

(5) Ante, 526.

(6) Lord Eldon in his judgment

in *Coombes's case*, 2 Rose, 399. intimated, that there would be some difficulty, when the application for a discharge upon a *habeas corpus* is made to a Judge at chambers, in regard to the mode by which the Judge could look into the proceedings, as there was some doubt, with respect to his power to compel the *production* of them. But

the party committed is satisfactory, the Court or Judge may, in that case, order him to be discharged.

*Of committing the bankrupt.*

What are considered matters of *form*, and what of *substance*, in the construction of the warrant of commitment, may be collected from some of the preceding cases. In one of these, where the bankrupt refused to be sworn, and the warrant committed him till he should full answer make to the questions "*put to him as aforesaid*," no questions having been previously set out, — this inaccuracy was held to be mere matter of *form*, which would justify the Court in recommitting the bankrupt. So, where the warrant set out several questions, to some of which, taken singly, the answers were satisfactory, — it was considered no valid objection, that the warrant committed the party till he should full answer make "*to the questions so put to him as aforesaid*." (1) These are two instances of insufficiency merely in the *form* of the warrant. The above noticed case of *Ex parte Cassidy* (2) (where it appeared on the face of the warrant, that the commissioners had improperly delegated their authority to other persons to examine the bankrupt) will explain what is considered a defect in *substance*.

*What are mere matters of form.*

The commissioners, having a *discretionary* power to commit the bankrupt if his answers are not satisfactory to themselves, are not liable to an action for so committing him, — notwithstanding he is in fact discharged afterwards by *habeas corpus*, on the ground of the Court thinking the answers to be satisfactory (3); though the contrary of this decision was formerly held. (4) Neither will any

*When commissioners not liable for committing bankrupt.*

now, as the statute *expressly directs* the Judge, if required thereto by the party committed, to inspect the whole of the examination, for the purpose of considering whether he has answered satisfactorily or not, it is submitted, that as a necessary consequence of this provision, the Judge must now be clothed with the power of ordering

the *production* of that, which he is directed by the legislature to *inspect*.

(1) *Ex parte Vogel*, 2 B. & A. 219.

(2) *Ante*, page 525.

(3) *Dowell v. Impey*, 1 B. & C. 163.; and see *ante*, page 166.

(4) *Miller v. Seare*, 2 Bl. 1141.

*Of committing the bankrupt.*

When bankrupt desirous to complete his examination.

action lie against them for a commitment, which is bad only for a *formal* defect in the warrant. (1)

When a bankrupt is committed for not answering, and is afterwards desirous to complete his examination, and be discharged, he must send word to the commissioners, that he is willing to submit and answer the questions, — and the commissioners will then appoint a meeting at the expense of the estate; for the bankrupt has no estate, or, at least, is supposed to have none. (2) And where, in such a case, the bankrupt applied to be brought before the commissioners, but the assignees refused, unless he would pay the expenses of the meeting, — the Lord Chancellor directed, that if there were no effects, the commissioners should meet *gratis*, receiving their fees out of future effects, if there should be any; and added, that if the bankrupt should be again committed for not answering fully, he would find it very difficult to obtain another order to bring him up. (3)

If any gaoler, to whose custody the bankrupt, or any other person, shall be committed by the commissioners, shall suffer either the one or the other to escape (4), he is liable to a penalty of 500*l*.

(1) *Bracey's case*, Comb. 391.

(2) *Rex v. Jackson*, 1 T. R. 654.  
*Ex parte Graham*, 2 Bro. 48.

(5) *Ex parte Cohen*, 18 Ves. 234.

(4) Section 38.

## SECTION V.

### *Of the Bankrupt's Rights and Privileges.*

1. *Of his Privilege from Arrest.*
2. *Of his Maintenance during his Examination.*
3. *Of his Allowance under the Commission.*
4. *Of his Right to the Surplus.*
5. *As to his Right to acquire Property before obtaining his Certificate.*

(And see further "*Supersedeas*," "*Certificate*," "*Actions by an uncertificated Bankrupt*.")

#### 1. *Of the Privilege of the Bankrupt from Arrest.*

The bankrupt is by the new statute (1) declared to be free from arrest or imprisonment by any creditor, in coming to surrender, as well as after such surrender, for the period of forty-two days—and for such further time as shall be allowed him for finishing his examination, not exceeding three calendar months (2) — provided he is not in custody at the time of his surrender. And if he should be arrested for debt, or on any escape warrant (3), in coming to surrender, or shall after his surrender be so arrested within the before-mentioned time, he is entitled (on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving him a copy thereof) to be immediately discharged. If the officer shall afterwards detain him, he is liable to a penalty of 5*l.* for every day of such detention, to be recovered by the bankrupt for his own use, by action of debt in his own name, in any court of record at Westminster, with full costs of suit.

For what period bankrupt privileged.

(1) Section 117.

(2) Section 118.

(3) That is, an escape warrant at the suit of a creditor. 14 Ves. 41. 1 B. & A. 311.

*Privilege  
from  
arrest.*

Does not  
lose his  
privilege  
by refusing  
to sur-  
render, if  
he sur-  
renders in  
due time  
after-  
wards.

If in pri-  
son, not  
protected  
from sub-  
sequent  
detainers.

Until ac-  
tual sur-  
render,  
privilege  
confined  
to the act  
of his  
going to  
surrender.

And, though a bankrupt may have been apprehended by the warrant of the commissioners, for any refusal to submit to their authority, or any non-conformity to the provisions of the act of parliament,—yet, if he shall (within the time allowed him to surrender) afterwards submit to be examined, and in all things conform, he will be entitled to the same benefit under the act, as if he had voluntarily surrendered. (1) It is also immaterial, whether the bankrupt surrender at a private, or a public meeting of the commissioners; for he is in either case, after his surrender, equally entitled to his privilege from arrest. (2)

If the bankrupt be in prison at the time of his surrender, he is, of course, not protected from subsequent detainers: for the above section only gives him the privilege of freedom from arrest or imprisonment,—provided he is *not in custody* at the time of his surrender. (3)

This privilege of freedom from arrest is intended to enable the bankrupt to surrender himself to the commissioners, as well as to encourage him the more speedily to do so,—and is not a general and independent privilege, during the whole time allowed by the act of parliament for the surrender. Therefore, until actual surrender, the privilege is confined to the act of his going with that object. Thus, if a bankrupt be abroad, and returns with an intention to surrender, and is arrested on his landing, or within a day or two after his arrival, before he can conveniently make his surrender,—he will be entitled to the privilege, if it appears that he was actually going to surrender. (4) So, where a bankrupt was arrested in London, and it appeared that he was *bonâ fide* in his way from Bath to Liverpool, for the purpose of examination before the commissioners,—he was discharged by Lord Eldon, upon motion. (5) But, where a bankrupt came from Holland to England within the forty-two days, with an intent to surrender himself upon the forty-

(1) Section 1, 5.

(2) *Ex parte Wood*, 1 Rose, 46. 156.

(3) *Ex parte Goldie*, 2 Rose, 543.

(4) *Kenyon v. Solomon*, 1 Comp.

(5) *Ogle's case*, 11 Vex. 556.



second day — but, finding that his time for surrender was enlarged to a further day, he then laid aside his design of surrendering himself upon the forty-second day, and did *not, in truth, mean to surrender until the enlarged day* — and in the intermediate time was arrested by one of his creditors, — it was held, under these circumstances, that he was not entitled to this privilege. (1) Where a bankrupt, however, before he received a summons from the commissioners, delivered his keys and effects to the messenger, and promised to submit to the directions of the law — and, only an hour after he had been served with the commissioners' summons to surrender, was arrested; — upon petition to the Lord Chancellor to be discharged, it was considered in this case, that what the bankrupt had already done was all that he could then do, and was, so far, a compliance with the requisitions of the bankrupt law; — he was, therefore, ordered to be discharged, upon his consenting not to sue the officer who arrested him. (2)

*Privilege from arrest.*  
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When the bankrupt *has* surrendered, his privilege continues from that time until and during the whole of the forty-second day (3); — or, if the time for his surrender has been enlarged by the Lord Chancellor, and he then duly surrenders, and the commissioners enlarge the time for his *examination*, his privilege will continue during the whole of such enlarged time (not exceeding three calendar months) as the commissioners shall by indorsement upon the summons appoint. (4) And the same, if the commissioners enlarge the time for his examination (after he has surrendered) within the forty-two days. (5) And, though the commissioners omit to insert in their certificate of the surrender the *actual day*, until which the

If examination enlarged, privilege continues, but not exceeding three calendar months.

(1) *Kenyon v. Solomon*, 1 Cowp. 156.

(2) *Ex parte De Fries*, Davies, 163.

(3) *Ex parte Donlevy*, 7 Ves. 317. *Ex parte Davies*, Buck, 80.

(4) Section 118.; and see *Simpson's case*, Buck, 424. 2 Wils. 127.

*Ex parte Hawkins*, 4 Ves. 691.

(5) *Simpson's case*, supra. *Davis v. Trotter*, 8 T. R. 476. *Darby v. Baughan*, 5 T. R. 209.; and see *re Dalton*, 1 Ball & B. 130.

*Privilege  
from  
arrest.*

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Where  
bankrupt  
attends  
without a  
summons.

Where  
commis-  
sioners ad-  
journ *sine  
die*.

Where  
time for  
surrender  
is expired,  
and bank-  
rupt ob-  
tains an  
order for  
his sur-  
render.

examination is adjourned, the bankrupt is still entitled to his privilege; for his protection is granted by the statute, independently of the commissioners' certificate. (1) But commissioners cannot give the bankrupt a protection for an *unlimited* period of time beyond three calendar months, in order to enable him to make a full disclosure of his estate and effects. (2) The omission by the commissioners to indorse the adjournment of the bankrupt's last examination on his summons, will not deprive him of his privilege. (3) And where a bankrupt's last examination has been adjourned *sine die*, — if at a meeting under the commission for a distinct purpose, and without a summons, he voluntarily attends in order to be examined, and is there arrested, — he is entitled to be discharged on general common law principles: viz. as a witness, or party, attending the commissioners. (4) But where the last examination is adjourned *sine die*, on the ground that the commissioners consider all further examination useless — and during the adjournment, and before any further meeting is had, the bankrupt is arrested, — he will not in this case be entitled to be discharged (5); unless, indeed, the commissioners have (pursuant to the 118<sup>th</sup> section) indorsed a protection on the bankrupt's summons.

Where the time for the bankrupt's surrender had expired, and he had obtained an order of the Lord Chancellor for the commissioners to be at liberty to meet and take his surrender, and he was afterwards taken in execution; — Lord Eldon, upon his application to be discharged, said it was a new case, and doubted his own authority to make the order, as the bankrupt was not strictly *coming to surrender according to law*; and he added, that if he made any order for the bankrupt's discharge, it must be upon the plaintiff in the action, and not upon the gaoler. (6)

(1) Ex parte Leigh, 1 G. & J. 264. Price's case, 3 V. & B. 23.

(2) Section 118., ante, 515.; and see Cloughton v. Leigh, 1 B. & C. 652. Ex parte Woods, 1 G. & J. 75.

(3) Price's case, 3 V. & B. 23.

(4) Ex parte Ross, 1 Rose, 260.

(5) Ex parte Woods, 1 G. & J. 75.

(6) Anon. 15 Ves. 1.

After the bankrupt has passed his final examination, if he is summoned by the commissioners to attend them upon declaring a dividend, or for any other purpose, he is equally protected with all other persons who may be examined before them, *eundo, redeundo, et morando*; for the bankrupt, or person so summoned, is to be considered in the character of a witness, or party attending a legal tribunal, sitting in the nature of a court in the administration of justice. (1) But if the bankrupt, or any other party, comes voluntarily before the commissioners, without a summons, and without any necessity for his so doing, he will then not be privileged (2) *eundo et redeundo*.

A bankrupt is entitled to the privilege of a party attending his own cause, in freedom from arrest, on his return from attending his petition for leave to surrender, after the time originally appointed for his surrender has expired, — provided he deviates no further, than to call on his solicitor to arrange the proper steps for giving effect to the order. (8)

And whether the debt, upon which a bankrupt is arrested, is, or is not, proveable under the commission, he is equally entitled, in all the cases before mentioned, to the privilege from arrest. (4) The privilege also extends to an attachment for not paying money under an award, which has been made a (5) rule of court, — or for not lodging money in court, pursuant to a decree or order of the Court of Chancery. (6) For, though the form of the process be criminal, yet if it issue to compel payment of a debt, it will be as much an arrest within the meaning of the statute, as every other mode by which a creditor can arrest a bankrupt for a debt. (7) And where the Lord Chancellor

Privilege  
from  
arrest.

After sur-  
render, if  
summoned  
by com-  
missioners,  
protected  
*eundo, &c.*

Upon at-  
tending his  
petition  
for leave  
to sur-  
render,  
privileged  
*redeundo*.

Imma-  
terial whe-  
ther the  
debt is  
proveable  
or not.

Privilege  
extends to  
attach-  
ment  
under an  
award, or  
a decree.

Where an  
action di-  
rected.

(1) *Arding v. Flowers*, 8 T. R. 554.

(2) *Anon.* 1 Salk. 544. *Ex parte Ross*, 260.

(3) *Ex parte Jackson*, 15 Ves. 116.

(4) *Darby v. Baugham*, 5 T. R. 209.

(5) *Ex parte Parker*, 3 Ves. 554.

(6) *Wall v. Atkinson*, 2 Rose,

196.

(7) *Re M'Williams*, 1 Sch. & Lef. 169.

*Privilege  
from  
arrest.*

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directed an action to be brought by the bankrupt against the assignee to try the validity of the commission, and the bankrupt (having failed in the action) was taken in execution for the costs, he was, on petition to the Chancellor, ordered to be discharged. (1)

Where  
arrest ille-  
gal, all de-  
tainers  
bad.

When the arrest is illegal, all *detainers* are inoperative, and the bankrupt will be discharged from them; for it is the arrest alone that gives any efficacy to the detainers. (2) But, where a bankrupt was committed for a contempt, in not having obeyed an order of the Lord Chancellor to bring into the Master's office the title deeds of an estate sold under the commission — and the sale having been unduly made, the bankrupt was ordered to be discharged from that commitment — but detainers having been lodged against him, he petitioned also to be discharged from those detainers; — Lord Eldon, after consulting with two of the judges, held, that these subsequent detainers must stand (3), according to the practice of the law.

Surrender  
does not  
protect  
bankrupt  
escaping  
from pri-  
son.

Where a bankrupt escaped out of the custody of the marshal of the King's Bench, and surrendered to a commission subsequently issued, being then at large, — a surrender, under these circumstances, was held not to operate as a protection against the right of the marshal to retake him, and retain him in custody. (4)

As to pro-  
tection  
from ar-  
rest at the  
suit of the  
crown.

It was formerly considered, that a bankrupt was not privileged from arrest upon an *extent*, even whilst under examination, as the crown was not bound by the bankrupt acts. But it has been more recently held, that, although the crown was clearly not bound by the statutes in bankruptcy, the bankrupt was privileged from arrest whilst in actual attendance before the commissioners; for that the

(1) *Ex parte Gregory*, 1 G. & J. 177.

(2) *Ex parte Ross*, supra. *Ex parte Moore*, Buck, 521. *Ex parte Wilson*, 1 Atk. 152.; but see *Barclay v. Faber*, 2 B. & A. 743. *contra*.

(3) *Ex parte Dumbell*, 10 Ves. 328.

(4) *Anderson v. Hampton*, 1 B. & A. 308. *Ex parte Johnson*, 14 Ves. 36.

spirit of the common law affects the Crown equally with any other creditor; and the principle is, that all witnesses are protected in attending a Court competent to enforce their attendance. (1) If, however, the bankrupt be arrested at the suit of the Crown, when not in actual attendance before the commissioners, or on his way to or from them, he is in this case not entitled to be discharged from such arrest, — although the commissioners have in fact enlarged the time for his examination, and extended his protection. (2) When the bankrupt is entitled to be discharged from an arrest at the suit of the Crown, the order of discharge will be made on the gaoler, who has the bankrupt in custody. (3)

*Privilege  
from  
arrest.*  
————

A bankrupt, however, may be taken by his *bail*, even whilst attending to pass his examination, so as he is not taken away from the commissioners before his examination is finished; for the statute expressly excepts the case, where the bankrupt is *in custody* at the time of his surrender; and a defendant is always considered in law to be in the custody of his bail. (4) But in the case of bail to the sheriff on an *arrest*, — *that* is not a custody within the strict meaning of the statute, at least, while the bail permit the principal to go at large — whatever it might be if they kept him in their *actual custody*. (5) Lord Hardwicke (in a case of this kind) observed, that he did not know that bail, taking their principal coming to a court of justice to be examined as a witness, had ever been determined to be guilty of a contempt of the court, provided they brought him to be examined by that court. (6) The courts, however, have sometimes (upon application of the bankrupt) enlarged the time for his surrendering in discharge of his bail, in order that he might pass his examination before

*Not pro-  
tected  
against his  
bail.*

*As to en-  
larging  
time for  
surrender  
in dis-  
charge of  
bail.*

(1) *Ex parte Russell*, 1 Rose, 278. 19 Ves. 163.

(2) *Ex parte Temple*, 2 Rose, 22. 267.

(3) 1 Rose, 278. 19 Ves. 163.

(4) *Ex parte Gibbons*, 1 Atk. 258.

(5) *Ex parte Leigh*, 1 G. & J.

(6) 1 Atk. 238.

*Privilege from arrest.*

such surrender. (1) But, as the commissioners have now authority to have the bankrupt brought before them to be examined, whether he is in custody upon mesne or upon final process, there does not seem to be any necessity henceforth for such an application; the object of which was, to prevent the inconvenience and expense of the commissioners attending the bankrupt in prison to take his examination, as they were formerly obliged to do when he was charged in execution. (2) The Court of Exchequer, however, have made an order of this kind since the commissioners have possessed the authority to have the bankrupt so brought before them (3) — a power which was first given them by the 49 G. 3. c. 121. s. 13.

*Mode of proceeding to be discharged from arrest.*

It does not seem that the *commissioners* have power to *discharge* a bankrupt, or a witness, who is improperly arrested whilst attending them; the practice being to apply either by motion, or petition, to the Lord Chancellor for a discharge — and, if necessary, for process against the officer for a contempt. (4) A person undertaking to indemnify the officer against conduct, which would amount to a contempt, will be considered equally guilty of the contempt himself. (5) The application for the discharge of the bankrupt should be by *petition*, unless the arrest is under circumstances amounting to a *contempt* — in which case it should be by motion. (6) The contempt, however, is only cognizable as such by the Lord Chancellor sitting in bankruptcy, and not by any other court; therefore, the Court of King's Bench refused to discharge a person arrested whilst attending commissioners of bankrupt, as the contempt was considered to be not to that court. (7)

*When bankrupt in custody*

The proof or claim by a creditor of his debt, we have before seen, operates of itself as a discontinuance of any

(1) *Maude v. Jowett*, 3 East, 145. *Crump v. Taylor*, 1 Pri. 74. *Glendinning v. Robinson*, 1 Taunt. 320.

(2) 5 Geo. 2. c. 30. s. 6.

(3) *Crump v. Taylor*, *supra*.

(4) *Ex parte Kerney*, 1 Atk. 55. *Ex parte King*, 7 Ves. 312.

(5) *Ibid.* *Ex parte Dixon*, 8 Ves. 104.

(6) *Anon.* 1 Rose, 230.

(7) *Kinderv. Williams*, 4 T.R. 377.

action previously brought against the bankrupt (1); and if the bankrupt is in custody at the time of such proof or claim, he is entitled to be immediately discharged. Where also a creditor, who holds the bankrupt in arrest under mesne process, petitions to prove his debt, the bankrupt is entitled to his discharge *instantly* upon the order for the proof. (2) So, where a creditor (previous to the commission) obtained a verdict against the bankrupt for a nominal sum subject to a reference, and the award was made, and judgment entered up for the debt and costs after the issuing of the commission — upon which the creditor proved his debt, and took the bankrupt in execution for the costs — the bankrupt was in this case ordered to be discharged. (3)

Privilege  
from  
arrest.

at the suit  
of a cre-  
ditor prov-  
ing, enti-  
tled to im-  
mediate  
discharge.

## 2. Of the Bankrupt's Right to Maintenance during his Examination.

By section 114. of the new statute, the commissioners are empowered before the choice of assignees — and, after assignees are chosen, *they* are then authorised (with the approbation of the commissioners) from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family.

Only en-  
titled to  
it, until  
he passes  
his exami-  
nation.

This is a new and a very proper enactment in the Bankrupt law — the former statutes having contained no provision to this effect, — though the *custom* was to make the bankrupt a reasonable allowance for his maintenance. For, as the bankrupt is bound to employ himself previously to his examination, in making up his accounts and arranging his affairs for the benefit of his creditors, it seems but just, that they should allow him sufficient to maintain himself and his family, whilst he is devoting his time to their service.

But though the bankrupt is now entitled to such maintenance, as the commissioners or the assignees shall think

Not jus-  
tified in  
appropri-

(1) See ante, page 184.

(3) Ex parte *Haynes*, 1 G. & J.

(2) Ex parte *Irving*, Buck, 423. 107.

**Maintenance.**

ating of his own authority any part of his effects for that purpose.

proper to allow him, yet he will not be justified, and still less any third person, in taking any part of his effects and appropriating it for that purpose, without the consent of the commissioners or assignees. For where a sister-in-law of the bankrupt, at his request, took out of his house such a quantity of his plate as would raise 20*l.* for the maintenance of himself and family, and borrowed 20*l.* upon it, which was actually expended for that purpose—it was held, that the assignees might recover the value of it in trover against the sister-in-law; though Lord Mansfield said, it was a very cruel case, — but if the assignees insisted on their claim, that the Court could not relieve the defendant. (1) The bankrupt, however, (as we have before seen (2),) may determine on the propriety of retaining such part of his wearing apparel as he thinks is necessary for his use; for he does this at the risk of being indicted for felony. (3)

### 3. *Of the Bankrupt's Allowance under the Commission.*

When he pays 10*s.* in the pound.

By section 128. of the new statute, — if the bankrupt obtains his certificate, and the net produce of his estate pays 10*s.* in the pound, he is entitled to an allowance of 5 per cent. out of such produce, to be paid him by the assignees, provided such allowance shall not exceed 400*l.* (4)

When 12*s.* 6*d.*

If his estate pays 12*s.* 6*d.* in the pound, he is entitled to an allowance of 7*l.* 10*s.* per cent., not exceeding 500*l.*

When 15*s.*

And if the estate pays 15*s.* in the pound or upwards, he is then entitled to an allowance of 10 per cent., not exceeding 600*l.*

When he does not pay 10*s.*

But, if the produce of his estate shall not pay the creditors 10*s.* in the pound, the bankrupt can in that case only be allowed so much as the assignees and commissioners

(1) *Thompson v. Councill*, 1 T.R. 157.

(2) Ante, 384.

(3) *Ex parte Ross*, 1 Rose, 33. 17 Ves. 374.

(4) These regulations are similar to those in the 5 Geo. 2. c. 30.

s. 7. & 8., except that the extent of the allowance is now made double the amount of what the bankrupt was before entitled to. The right to any allowance was first given to the bankrupt, by the 4 & 5 Ann. c. 17.



shall think fit, not exceeding 5l. per cent., and 300l. in the whole. Allowance.

Under the former statutes, it was held that the bankrupt was not entitled to his allowance until a *final* dividend was made; and the reason assigned was, that the 5 G. 2. c. 30. s. 7. only gave him an allowance, in case the net produce of his estate should be sufficient to pay the creditors 10s. in the pound “*over and above such allowance;*” and that, as any creditor might come in and prove his debt before a final dividend, it could not be ascertained till then, whether the bankrupt would be entitled to any allowance at all. (1) But it will be seen, that the clause in the new statute is somewhat differently worded from that of the 5 G. 2.; for the words, “*over and above such allowance;*” seem purposely omitted; and it may, therefore, be a question now, not only whether the bankrupt is not entitled to his allowance before a *final* dividend; but whether, if the net produce of his estate amounts to a sum sufficient to pay his creditors 10s. in the pound, he is not entitled to his allowance out of *that very sum*, notwithstanding the produce of his estate is only *just sufficient* to pay the creditors 10s. in the pound — and, consequently, after the deduction of his allowance, will not yield a dividend equal to that amount.

Whether bankrupt entitled to allowance before a final dividend.

Quære, if estate only *just sufficient* to pay 10s. in the pound.

It has been said, if the bankrupt has once received his allowance, he is not bound afterwards to refund any part of it (2); but there may be some doubt as to the correctness of this position—for the Lord Chancellor has certainly the power to make the bankrupt refund; and it would depend most probably upon the peculiar circumstances of the case, whether the Chancellor would interpose his authority or not. (3)

As to re-funding allowance when once received.

The above section, as we perceive, does not enable the bankrupt to demand his allowance until he obtains his certificate; and it would, indeed, be of no service to him if he

Bankrupt must obtain certificate be-

(1) Ex parte *Stiles* and *Pickart*, 1 Atk. 208.

(5) See ex parte *Lanfear*, 1 Rose, 442.

(2) *Russel v. Russel*, 1 Bro. 270.

*Allowance.*  
 fore divi-  
 dends, to  
 claim his  
 allowance.

could — for until he is entirely cleared by his certificate, every thing in his hands is liable to satisfy the claims of his creditors. (1) And he must not only obtain his certificate before he can claim his allowance—but he must also obtain it before the dividends are made, which entitle him to such allowance. (2)

When  
 right to  
 allowance  
 vests.

When the bankrupt has obtained an *order of the commissioners* for his allowance, it becomes a vested interest in him, and is transmissible to his representatives (3); but, according to the words of the above section, the interest does not actually vest in the bankrupt until a dividend is *declared*. (4) It is not necessary, however, that the bankrupt should be alive at the time of the declaration of the dividend (5), or that he should have actually obtained the commissioners' order for his allowance (6); for where a bankrupt died before his estate paid 10s. in the pound, the Vice-Chancellor, after that dividend had been declared, ordered the assignees to pay the allowance to the bankrupt's personal representative. (7)

Allowance  
 independ-  
 ant of in-  
 terest to  
 creditors.

If the bankrupt's estate pays 20s. in the pound, and there are creditors whose debts carry *interest*, they are not entitled to such interest, in diminution of the bankrupt's allowance. (8)

As to al-  
 lowance  
 under a  
 second  
 commis-

Under a *second* commission the bankrupt is entitled to no allowance, unless his estate pays 15s. in the pound; for a certificate under a second commission only protects his person, unless every creditor receives a dividend to that amount; and his allowance, therefore, would in that predicament become the property of his creditors. (9)

Allowance  
 to part-  
 ners under  
 a joint

Partners are not entitled under a joint commission to a double allowance, that is, one in respect of the joint, and another in respect of the separate estate; but only one

- |  |   |
|--|---|
| (1) Ex parte <i>Grier</i> , 1 Atk. 207.  | (6) Ex parte <i>Calcot</i> , 1 Atk. 209.                  |
| (2) <i>Groome v. Potts</i> , 6 T.R. 548.   | (7) Ex parte <i>Salford</i> , <i>supra</i> .              |
| (3) Ex parte <i>Trap</i> , 1 Atk. 208.   | (8) Ex parte <i>Morris</i> , 1 Ves. jun.                  |
| (4) Ex parte <i>Salford</i> , sittings<br>after Trin. T. 1826, per Vice Chan-<br>cellor. | 132. 2 Bro. 79. <i>Bromley v. Goodere</i> ,<br>1 Atk. 80. |
| (5) <i>Ibid</i> .  | (9) Ex parte <i>Gregg</i> , 6 Ves. 23 <sup>c</sup> .      |

allowance is to be divided between them, in respect of both joint and separate effects; and this is to be calculated according to the proportions, which the surplus of each of their separate estates, after payment of their respective separate debts — and the respective moieties of their joint estate — may have contributed to the payment of their joint debts. (1) Neither is a bankrupt under a joint commission entitled to any allowance, unless *both* the *joint and separate* creditors are paid 10s. in the pound. (2) Notwithstanding, therefore, the *separate* estate of the bankrupt pays 20s. in the pound, he cannot claim any allowance, before the *joint* creditors are paid with the surplus 10s. in the pound. (3) And where a separate commission issued against one of several partners, under which the separate estate paid only 2s. in the pound, and the joint estate 18s., the bankrupt was, in this case, held not entitled to any allowance. (4) Under a joint commission, both the separate and joint estates contribute to the payment of the allowance. (5)

*Allowances:*  
——  
commis-  
sion.

By the new statute, a remedy is provided for a great hardship, which sometimes occurred under a joint commission, as to the claim of a bankrupt's allowance. For, under the former law, it was held that one of several partners was not entitled to any allowance (notwithstanding he had obtained his certificate, and both estates had paid 10s. in the pound,) unless *every one of the partners* had also obtained *his certificate*. (6) But now by section 129. of the new statute, it is declared, that in all joint commissions, under which any partner shall have obtained his certificate — if a sufficient dividend shall have been paid upon the joint estate, and also upon the separate estate of such partner, —

One partner now entitled to allowance, though the other has not obtained his certificate.

(1) Ex parte *Bate*, 1 Bro. 453.  
1 C. B. L. 523.

(2) Ex parte *Powell*, 1 Madd. 68.

(3) Ex parte *Holmes*, 2 Rose, 95. 3 Ves. & B. 157.

(4) Ex parte *Farlow*, 1 Rose, 421. 2 Ves. & B. 209. S. P. Ex parte *Terrell*, Buck. 345.

(5) 1 Madd. 70. Mr. Christian, however, suggests that it should be paid only out of the joint effects.

2 Christ. B. L. 514.

(6) Ex parte *Powell*, 1 Madd.

68. Ex parte *Bate*, 1 Bro. 453.

**Allowance.** such partner shall be entitled to his allowance, although his co-partner, or co-partners, may not be entitled to any.

Where bankrupt deprived of all right to allowance.

There are, however, certain cases of misconduct on the part of the bankrupt, which will deprive him of all right to any allowance, and which equally bar him from obtaining his certificate. Thus, if he has lost by *gaming* (1) in one day 20*l.*—or 200*l.* within one year before his bankruptcy—or 200*l.* in one year by stock-jobbing;—or if he has destroyed or falsified any of his books or papers with intent to defraud his creditors—or has concealed property to the value of 10*l.*;—or has been privy to a fictitious debt being proved;—he will in either of these cases forfeit all claim to any allowance.

#### 4. *Of the Bankrupt's Right to the Surplus.*

Assignees required to account to bankrupt for surplus.

By section 132. (2) of the new statute, the assignees are required, upon request made to them by the bankrupt, to declare to him how they have disposed of his real and personal estate, and to pay the surplus, if any, to him or his personal representatives. And if the creditors, who have proved under the commission, shall be fully paid, the bankrupt will be entitled to recover the remainder of the debts due to him.

But creditors first entitled to interest.

The expenses of working the commission are, of course, to be first refunded to the assignees out of the bankrupt's estate, before the surplus is restored to him. (3) And the assignees, also, are now restricted from paying such surplus, until *all* the creditors who have proved shall have received interest upon their debts, to be calculated at the rate, and in the order, specified in the act (4); this provision differing from the former rule, which allowed interest to the creditors only when there was a *contract*, either ex-

(1) Section 130.

(2) This clause is substituted for the 5 Eliz. c. 13. s. 4. 1 Jac. 1. c. 15. s. 15.

(3) *Ex parte Dew*, cit. 2 Ves. jun. 301.; and see *Bromley v. Goodacre*, supra.

(4) See ante, page 271.

pressed or implied, to pay it. (1) And though creditors may have signed receipts *in full*, upon a payment of 20s. in the pound, under the idea that there would be no surplus, they are nevertheless still entitled to interest before the bankrupt can claim the surplus. (2)

Surplus.

A bankrupt pending a commission has a right to an inspection of the accounts of his assignees, in respect to his interest in the surplus; and the Lord Chancellor will, upon petition, rectify palpable errors pointed out by the bankrupt. But where the bankrupt has to a certain degree an intercourse with the estate during the commission, he will not afterwards, in the Master's office, be permitted to surcharge and falsify accounts as to dividends paid, which have been settled by the commissioners in the administration of the bankruptcy. (3)

Bankrupt may inspect and impeach the assignees' accounts.

If the bankrupt is dead, and there is real and personal estate more than sufficient to pay the debts with interest, the surplus real estate must be conveyed to his heir (if he died intestate), and his personal estate be divided amongst (4) his next of kin. But if he leaves a will, then the surplus of both estates will be subject to the dispositions contained in it, notwithstanding the will was made previous to his bankruptcy; for neither the bankruptcy, nor the bargain and sale by the commissioners, will operate as a revocation; the Bankrupt law taking the property out of the bankrupt only, for the purpose of paying his creditors; and from the moment that the debts are paid, the assignees become mere trustees for the bankrupt — and can be called upon to convey to him. (5)

When bankrupt is dead, surplus goes to his heir and next of kin, unless he leaves a will.

(1) *Bromley v. Goodere*, 1 Atk. 75. *Ex parte Rooke*, *ibid.* 244. *Ex parte Champion*, 3 Bro. 436. *Ex parte Hankey*, *ibid.* 504. *Ex parte Mills*, 2 Ves. jun. 295. *Ex parte Locks*, 1 Rose, 317. 1 Ves. & B. 342. *Ex parte Williams*, *ibid.* 399. The justice of this recent alteration of the rule as to the allowance of interest, was long ago pointed out by Mr. Christian, vol. ii. 504., and

by Sir William Evans in the 4th vol. of his edition of the Statutes, page 3. Ev. B. L. 22. note 10.

(2) *Ex parte Deey*, 1 Ball & B. 77.

(3) *Twogood v. Swanston*, 6 Ves. 485.; and see 18 Ves. 81.

(4) *Bromley v. Goodere*, 1 Atk. 81.

(5) *Charman v. Charman*, 14 Ves. 580.

**Surplus.**

As to the rights of the heir, and executor, of the bankrupt to the surplus, when part of real estate sold.

Where part of a bankrupt's property consisted of real estate, *part* of which was *sold* by the assignees during his life — *another part contracted to be sold* at the time of his death — and the remainder was *sold* after his death; — it was determined in a question between his real and personal representatives, as to their rights to the surplus, that the heir at law had no claim in respect of the estate which was *sold*, or *contracted to be sold*, during the life of the bankrupt; for *that part* of the estate was to be considered as converted into personalty: but that as to such portion of the real estate as was *unsold*, and *uncontracted for* at the death of the bankrupt, — *that* was held to descend to the heir, subject to the charge created by the Bankrupt law, for the payment of his debts. And the Court said, that it could make no difference in principle, whether such a charge were created by the provision of the law, or by the provision of the party; that, as far as the real estate was not exhausted by the charge, it was the property of the heir: that the bankrupt law had no purpose to alter the character of surplus property between the real and personal representatives of a bankrupt: and that, as to the charge for payment of debts created by bankruptcy upon the real estate of a deceased bankrupt, his personal estate is to be considered as first applicable; and that the heir was entitled in the first place to be indemnified out of the surplus, to the extent in which it should ultimately appear, that the real estate was not required for the payment of debts. (1)

When two firms, in which bankrupt is a partner, become bankrupt.

Where a man is a partner in two separate firms, each of which becomes bankrupt, the surplus of his separate estate must be applied in discharging the joint debts of the two firms, in proportion to the whole amount of the debts proved against each firm (2) respectively. And, generally, in cases of partnership the bankrupt's right to the surplus

(1) *Banks v. Scott*, 5 Madd. 498. L. 353. Ex parte *Barron*, *ibid.*

(2) Ex parte *Franklyn*, Buck, 354.  
332. Ex parte *Bruce*, Whitm. B.

will depend, as to the amount, upon the result of the account between the partners. (1) Thus, where the bankrupt had, under a separate commission, obtained an order for payment of the surplus to him, which was accordingly paid, — it was determined, that his partner was entitled to apply by petition in the bankruptcy for an account of such surplus, and for payment of his proportion of it; and that the Court had jurisdiction to make an order to that effect. (2)

*Surplus.*

One partner entitled to his proportion of the surplus obtained by his co-partner.

5. *As to the Right of an uncertificated Bankrupt to acquire and retain Property.*

A bankrupt is not actually divested of his property until the commissioners' assignment. (3) And, although property subsequently acquired by a bankrupt before he obtains his certificate, is liable to be taken from him by his assignees, if they choose to claim it — all such property in fact passing to them by the assignment of the commissioners (4), — yet it does not *absolutely* vest in them; and if *they* make no claim to it, the bankrupt has a right to such property, as against all *other* persons. (5) Thus, where an uncertificated bankrupt assigned after-acquired property, in trust, for a valuable consideration — and a creditor of the bankrupt seized it in execution, — it was held, that the trustee might recover it in trover from the creditor. (6)

Property not claimed by the assignees, the bankrupt may claim against all other persons.

Lord Kenyon, indeed, has upon more than one occasion (7) expressed an opinion, that the rights of the assignees do not extend to property, which the bankrupt acquires “as the fruits of *his personal labour*,” but there seems to be no sound reason for this distinction at law; for, though the assignees (as Lord Mansfield said) (8)

As to property acquired by personal skill or labour.

(1) *Ibid.*; and see *ex parte Lanfear*, 1 Rose, 442. *Ex parte King*, 17 Ves. 115. *Ex parte Taylor*, 2 Rose, 175.

(2) *Ex parte Lanfear*, *supra*.

(3) 2 Co. Rep. 26 a.

(4) See *ante*, 383.

(5) *Drayton v. Dale*, 2 B. & C.

293. 2 Dow. & R. 534.; and see *post*, title “Actions.”

(6) *Laroche v. Wilkinson*, Peake, 140.

(7) *Evans v. Brown*, 1 Esp. 70. *Webb v. Ward*, 7 T. R. 296.

(8) *Chippendale v. Tomlinson*, 1 C. B. L. 431.

*As to acquiring property.*  
—

cannot let out the bankrupt for profit, or contract for his labour,—yet when he has *realized property*, notwithstanding it may be the produce of his labour, or the fruits of his knowledge or his skill, and it would be in many cases cruel and unjust in the assignees to deprive him of it—still, it is apprehended, (according to the principle of the bankrupt law), they would have a strict right to claim it—as in the case (which has been before noticed) (1) of a patent for an invention obtained by him before his certificate. For every species of *property* acquired by a bankrupt before his certificate (no matter how obtained) is a sort of defeasible property, which his assignees—though none but his assignees are able to defeat. (2)

Creditors, not being assignees, have no right to take after-acquired property.

Creditors of a bankrupt, therefore, who are not assignees, have no property in goods acquired by him after his bankruptcy;—if they take them they are trespassers—if they are stolen from the bankrupt, they may be alleged (in an indictment for the felony) to be *his property*—if he sells them, he may receive the money for them—and if he pawns them, he may redeem them, on tendering the money for which they were pledged. (3)

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## SECTION VI.

*Of Actions at Law, and other Proceedings, by and against an uncertificated Bankrupt.*

(And see post, “*Certificate.*”)

If bankrupt not liable to a com-

Notwithstanding a man is declared a bankrupt under a commission issued against him, and his estate and effects are assigned to assignees, yet he is not *bound* by the ad-

(1) *Hesse v. Stevenson*, 1 B. & P. 565.; ante, 389.

(2) *Fowler v. Down*, 1 Bos. & P. 44. per Heath J.

(3) *Webb v. Fox*, 7 T. R. 391. per Grose J.; and see post, “*Actions.*”



judication of the commissioners; and if he be really not liable to a commission of bankruptcy, or is improperly adjudged one, he may maintain an action of trespass against his assignees. (1) And where a bankrupt was required by his assignees, on his last examination, to deliver to them his books of account, which he did — and it was afterwards found that he was not a trader, and that the commission had improperly issued, — it was held, that he might support an action of trover for the books against the assignees. (2) But when such an action is brought for some alleged irregularity in the proceedings, or without any great merits on the part of the bankrupt, the Lord Chancellor will not make an order for the bankrupt to inspect the proceedings, to enable him to find out the infirmities of the commission, if any should exist. (3)

**Actions.**

mission,  
may bring  
trespass or  
trover  
against his  
assignees.

If a bankrupt, also, has done any act amounting to an acquiescence in the commission, he is then estopped from suing his assignees. Therefore, where he goes to the different creditors, to solicit them to vote for particular persons as assignees (4); or where he takes a part in the sale of his own effects under the commission (5); or obtains his discharge out of custody in an action by a judge's order, on the ground of his bankruptcy (6); — he will not, in either of these cases, be allowed afterwards to question the commission in an action against his assignees. So, where in an action by the bankrupt against the petitioning creditor to try the validity of the commission, it was proved, that the bankrupt and petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts — and that the bankrupt *objected to part of the* petitioning creditor's account, whereupon the com-

When  
bankrupt  
estopped  
from  
bringing  
an action.

(1) *Perkin v. Proctor*, 2 Wils. 382.; and see ante, Ch. 5. s. 6.

(4) *Like v. Howe*, 6 Esp. 20.

(2) *Summersett v. Jarvis*, 6 Moore, 56. 3 B. & B. 2.

(5) *Clarke v. Clarke*, *ibid.* 61.

(6) *Goldie v. Gunston*, 4 Camp.

381. *Watson v. Wace*, 2 Carr. P.

(3) *Ex parte Vaughan*, 14 Ves. 171.

**Actions.**

What is  
not an  
estoppel.

missioners ticked off such items in it as they allowed, and struck a balance of 169*l.*; — this was held to be evidence (to be left to the jury) of an implied admission by the bankrupt, from his conduct and demeanor before the commissioners, that such a balance was due. (1) So a bankrupt will be restrained, after laying by for a long period — or after having already repeatedly questioned the commission, from further disputing it at law. (2) Therefore, where, after a petition presented by a bankrupt for a *supersedeas*, he abandoned the petition, and joined in a conveyance of part of his property, and solicited and procured also the requisite signatures to his certificate, — he was restrained from proceeding in an action (against the messenger) to impeach the commission. (3) And where, at the instigation of the petitioning creditor and another creditor, a bankrupt brought an ejectment to recover the possession of premises sold under a commission (under which he had acquiesced for seven years), — an injunction was granted, on the petition of the assignees, to restrain him from proceeding in it. (4) But the mere *surrender* by the bankrupt to the commission is not an estoppel to his right to dispute it at law; even though he presents a petition to enlarge the time for his surrender, in which he states that he has been *duly declared* a bankrupt. (5) Neither is a bankrupt estopped from controverting the validity of the commission in an action against a *stranger*, notwithstanding he has even obtained his certificate under it; for in order to create an estoppel, there must be reciprocity between the parties; and a stranger can neither take advantage of, nor be bound by, an estoppel. (6) And even in such an action against his assignees, an injunction will not be granted by the Court of Chancery to restrain him from proceeding in it, merely on the ground, that he

(1) *Jarrett v. Leonard*, 2 M. & S. 265.

(2) 18 Ves. 393.

(3) *Ex parte Cutten*, 1 G. & J. 317.

(4) *Ex parte Grant*, Buck, 90.

(5) *Mercer v. Wise*, 3 Esp. 216.

(6) *Butts v. Bilke*, 4 Pri. 240.

7 East, 352 b.

has obtained his certificate, — without alleging also, that the commission was valid, and that the action was brought with a view only to harass the assignees. (1)

A bankrupt, however, will not be permitted to try the validity of his commission, by actions against the *debtors* to his estate. Therefore, where a bankrupt, who insisted that his commission was invalid, gave one of his debtors notice not to pay his assignees, and brought an action for the recovery of the debt — and the assignees also threatened to do the same, — a bill of interpleader by the debtor was entertained; and upon the usual affidavit, and payment of money into Court, an injunction was granted. (2)

As a bankrupt, though uncertificated, can acquire and hold property against every one except his assignees, so he can maintain an action of *assumpsit* against a third person for his own work and labour performed since the issuing of the commission, and for materials furnished necessary to his labour. (3) And where no claim is made by the assignees, he may also maintain *trover* for goods acquired after his bankruptcy (4); and even *assumpsit* for money lent and advanced by him after his bankruptcy (5); as well as trespass *quare clausum fregit*, for a trespass (6) committed *before* his bankruptcy; for the defendant in any of these actions cannot object to the bankrupt's claim, unless his assignees interpose — and the bankrupt may, in fact, sue as a trustee for the assignees. (7)

But an uncertificated bankrupt cannot bring trespass against a defendant for seizing his furniture, who acted by *authority* of the assignees, notwithstanding the assignees

**Actions.**

Bankrupt not permitted to sue his *debtors*, to try the validity of commission.

May sue for after-acquired property, when assignees do not interpose.

But cannot sue a person acting by au-

(1) *Kirkpatrick v. Dennet*, 1 Sim. & S. 408. 1 G. & J. 300.

(2) *Lowndes v. Cornford*, 1 Rose, 180. 18 Ves. 299. *Harlow v. Crowley*, in Exchequer, Buck, 273. contra.

(3) *Chippendale v. Tomlinson*, 1 C. B. L. 431. *Silk v. Osborne*, 2 Esp. 140.

(4) *Fowler v. Down*, 1 Bos. & P. 44. *Laroche v. Wakeman*, Peake, 140. *Webb v. Ward*, 7 T. R. 296. *Webb v. Fox*, 7 T. R. 391.

(5) *Evans v. Brown*, 1 Esp. 170.

(6) *Clarke v. Calvert*, 3 Moore, 96.

(7) *Cumming v. Rocbuck*, 1 Holt, 172. *Clarke v. Calvert*, *supra*.

**Actions.**

—  
**Authority of  
 assignees.**

Or one  
 who ob-  
 tains a sur-  
 render of  
 their in-  
 terest.

had agreed with a friend of the bankrupt, for a valuable consideration, to leave such furniture in the bankrupt's possession; — for an uncertificated bankrupt is not entitled to retain any property *against* his assignees. (1) So, where an uncertificated bankrupt sued a creditor (who had become such since his bankruptcy) for seizing his effects subsequently acquired — and the creditor, after a rule to plead, obtained a surrender of the interest of the assignees in the effects seized; — it was held, that this was a ratification of the seizure by the assignees, and that the bankrupt could not recover. (2) And where a bankrupt before obtaining his certificate, brought an action upon a promissory note, and for money lent, — a plea that the plaintiff was an uncertificated bankrupt, and that his assignees “required the defendant to pay to them” the money claimed by the plaintiff, was held good; — and a replication, that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit, and that the commissioners had made no new assignment of the said note and money, was held bad — upon the established principle, that the general assignment of the commissioners passes to the assignees all his after acquired, as well as present, property and debts. (3)

When  
 bankrupt  
 may sue  
 assignees  
 for work  
 and labour.

Where the assignees employ the bankrupt in carrying on his trade or manufacture for the benefit of the estate, and pay him money from time to time, it is evidence of such a contract between him and the assignees, as will enable him to recover from them a reasonable compensation for his work and labour. (4)

When he  
 may sue a  
 creditor  
 who re-

In a case where the creditors of a bankrupt entered into a deed of composition to receive 8s. in the pound, in *full discharge* of their debts, and agreed to release every thing

(1) *Nias v. Adamson*, 3 B. & A. 225.

(2) *Hull v. Pickersgill*, 1 B. & B. 282. 3 Moore, 612.

(3) *Kitchen v. Bartsch*, 7 East, 53.

(4) *Coles v. Barrow*, 4 Taunt. 754.

beyond that to the bankrupt, and join in a petition to the Chancellor to supersede the commission — and one of the creditors, having two distinct debts due from the bankrupt (for one of which he held bills for the full amount), received his dividend of 8s. in the pound on both debts — and then recovered the full value of some of the bills; — it was held that the bankrupt, under these circumstances, was entitled to recover the money so obtained on the bills, in an action for money had and received. (1)

As a debt due to a bankrupt, *as trustee* for another, does not pass under the commissioners' assignment, — it has been held, that a bankrupt, who previous to his bankruptcy assigned a debt then owing to him, (and who became, therefore, in the nature of a trustee for the person to whom the debt was assigned) might sue the debtor in his own name for the benefit of the assignee of the debt. (2)

A bankrupt is personally liable for the *costs* of an action commenced by him, and proceeded in by the assignees in his name, notwithstanding he has obtained his certificate. And, though the Court of Chancery will protect him from such costs, when he acts fairly, — yet where he induces the assignees to pursue the action by misrepresentation, he will not be relieved. (3) Where he sues as trustee for his assignees, and for their benefit, and not for the fruits of his own personal labour, he has been required to give security for costs. (4) And the Court of Common Pleas, upon one occasion of this kind, refused to grant a new trial, unless the assignees would abide by the verdict, and become responsible for the costs. (5) So, where an uncertificated bankrupt (after being nonsuited in an action of trespass for false imprisonment in the Court of King's Bench, on the ground of not being prepared with evidence to prove the validity of a former commission)

*Actions.*

receives full value on a bill, after receiving a composition.

Bankrupt previously assigning a debt, may sue as trustee.

When bankrupt liable for costs.

When required to give security.

When proceedings will be stayed till costs paid.

(1) *Stock v. Mawson*, 1 B. & P. 286.

(2) *Winch v. Keeley*, 1 T.R. 619.

(3) *Ex parte Seaman*, 1 G. & J. 260.

(4) *Webb v. Ward*, 7 T.R. 296.

(5) *Noble v. Adams*, 7 Taunt. 89.

Actions.

brought a fresh action in the Common Pleas, — the last mentioned Court ordered the proceedings to be stayed, until he paid the costs of the former action; as he ought to have been prepared with such evidence on the first trial. (1) But in another case, where a joint action was brought by two persons, one of whom was a bankrupt, and the other a prisoner in Newgate, the same Court refused to require such security; though the judgment of the Court, in this case, seems to proceed upon the consideration of the circumstance of the *imprisonment* of one of the plaintiffs (2), and *not* of the *bankruptcy* of the other.

When  
action  
brought  
against  
bankrupt  
for debt  
proved.

Where an action is brought AGAINST a bankrupt for the same debt, which a creditor has proved under the commission, the proof cannot be *pleaded in bar* — but the bankrupt may either apply to the Lord Chancellor to expunge the debt, or move the Court in which the action is brought to stay proceedings. (3) In assumpsit against two defendants, where one pleaded *non assumpsit* and bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, as to the several matters pleaded by him — and the other defendant pleaded *non assumpsit*; — the latter was held not discharged by the *nolle prosequi*. (4)

When  
bankrupt  
indicted,  
where  
*venue*  
may be  
laid.

As to evi-  
dence.

What is  
not a va-  
riance.

On an indictment against a bankrupt for concealing his effects, the *venue* may be laid in any county, where the prosecutor can prove an actual concealment. (5) And, on the trial of such an indictment, a book delivered up at his last examination with other papers, on his signing a declaration that *they* contained a full and true disclosure and discovery of all his estate and effects, was held necessary to be produced as part of the prosecutor's case. (6) Where, upon an indictment of a bankrupt for perjury (alleged to have been committed in an affidavit sworn be-

(1) *Crawley v. Impey*, 8 Taunt. 407. 2 Moore, 460.

(2) *Anon.* 2 Taunt. 61.

(3) *Harley v. Greenwood*, 5 B. & A. 95.; and see ante, "Election," 189.

(4) *Moravia v. Hunter*, 2 M. & S. 444. *Noke v. Ingham*, 1 Wils. 89.

(5) *Rex v. Evans*, 1 Russ. & R. 70.

(6) *Ibid.*

fore a commissioner of the Court of Chancery), it was alleged that the defendant preferred his petition to the Lord Chancellor, setting forth various matters, and stating that "at the several meetings before the *commission*," the defendant declared openly to a certain effect—and upon the trial it appeared, that the statement of the petition was, that "at the several meetings before the *commissioners*," the defendant declared to that effect;—it was held, that this was no variance, inasmuch as it was sufficient to set out in the indictment the petition in substance and effect; and that the word "*commission*" also was one of equivocal meaning, being used to denote, either the *trust or authority* exercised, or the *person* by whom it is exercised; and that on this occasion it sufficiently appeared, from the context of the petition as set forth in the indictment, that it was used only in the latter sense. (1)

*Actions.*

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## SECTION VII.

### *Of Suits in Equity by and against an uncertificated Bankrupt.*

Though an uncertificated bankrupt cannot, generally speaking, bring a bill in equity (2); yet where he has a clear interest and the assignees refuse to sue, the Lord Chancellor will, upon petition, compel them (upon an offer of indemnity) to let him use their names (3); for his disability in general cases to sue is not to be acted upon, to the effect of gross injustice. (4)

Where bankrupt may sue in name of his assignees.

(1) *Res v. Dudman*, 4 B. & C. 850.

(2) *Hammond v. Attwood*, 3 Mad. 158.; and see *Bowser v. Hughes*, 1 Anst. 101.

(3) *Spragg v. Binkes*, 5 Ves. 587.

(4) Per Lord Eldon, *Benfield v. Solomons*, 9 Ves. 77. The practice, however, is stated somewhat dif-

ferently in Lord Redesdale's Treatise on Pleading, where it is laid down, that a bankrupt may sue in equity, if he disputes the validity of the commission, provided he brings the assignees before the Court by supplemental bill. Mitford on Pleading, 52.

*Suits in equity.*

Where demurrer allowed, for want of necessary allegations.

Where, on the ground of the proper proceeding being by petition.

But, where a bankrupt filed a bill against the assignees of estates in England and Barbice, for an account and payment of the balance to his assignees — and he made his assignees defendants, charging collusion between them and the other defendants, but did not aver that there would be a surplus, nor charge a direct application to his assignees to sue; — a demurrer was allowed for want of such allegations. (1) And, where a bill was filed by a bankrupt (who had taken the benefit of an insolvent debtor's act) and his assignees under that act, against the assignees under his commission and others, stating improper conduct and collusion, and that all or most of the creditors under the commission were satisfied, and praying an account, — a demurrer in this case was also allowed, on the ground that the proper mode of proceeding was by petition in bankruptcy. (2) So, where a bankrupt filed a bill against a debtor to his estate, asserting the invalidity of the commission, and charging collusion between his assignees and the debtor — a demurrer was likewise allowed, the proper course being, either to try in an action the validity of the commission, or to petition to remove the assignees. (3)

Where a bill retained.

Where bankrupt's suit entertained, notwithstanding

Where a bill, however, was filed by an uncertificated bankrupt in the Exchequer — though the assignees were not before the Court — yet it being admitted, that the assignees had already failed in an ejectment brought by them to recover the premises in question, by not being able to prove the petitioning creditor's death, — the Court retained the bill, until proper parties should be added (if necessary), the plaintiff paying the costs of the days. (4) And where a bankrupt filed a bill against a creditor (who was prosecuting an action at law against him) without making his assignees parties to the suit, and stated in his

(1) *Benfield v. Solomons*, 9 Ves. 77.

(2) *Saxton v. Davis*, 1 Rose, 79. 18 Ves. 72.

(3) *Hammond v. Attwood*, 5 Mnd. 158.

(4) *Govett v. Armitage*, 2 Anstr. 412.



bill, that if the accounts were taken between him and the creditors, a balance would be found due to him; and the bill also prayed a discovery as well as an account, and payment of the balance with the usual submission, and also an injunction and general relief; — a plea of bankruptcy was overruled by the Vice-Chancellor — though he thought the bill went too far, to pray that the balance of the account might be paid to the plaintiff (1); and this decision was afterwards affirmed upon appeal. (2)

Suit in equity.

plea of bankruptcy.

A bankrupt will be permitted to prosecute a petition, impeaching the debt on which the commission issued, *in forma pauperis* (provided a proper case is shown), upon a certificate of counsel, that the petitioner had just cause to be relieved, and an affidavit that he was not worth 5*l.* (3)

When bankrupt may petition in *forma pauperis*.

Upon the same principle, also, as that which incapacitates a bankrupt from being a *plaintiff* in a suit, he is in general protected from being sued in equity as a *defendant*. Thus, where a bankrupt had mortgaged a copyhold estate, but no bargain and sale was made to his assignees, and the mortgagee filed a bill against the bankrupt and his assignees to redeem, — a demurrer by the bankrupt was allowed, as he was not a *necessary* party to the bill. (4)

Bankrupt in general cannot be sued in equity.

So, the bankrupt cannot be joined as a *defendant*, in a suit against his assignees for the purpose of *relief*. (5) But it seems, if any *discovery* is sought of his acts *before* he became bankrupt, he may be compelled to answer to that part of the bill, for the sake of discovery, and to assist the plaintiff in obtaining proof; though, at the same time, his answer cannot be read against his assignees. (6) Therefore, where a bill was filed against a bankrupt and his assignees,

Except where bill prays a discovery.

(1) *Lowndes v. Taylor*, 2 Rose, 385. 1 Mad. 423.

(2) 2 Rose, 432.

(3) *Ex parte Northam*, 2 Ves. & B. 124.

(4) *Lloyd v. Lander*, 5 Mad. 282.

(5) *Griffin v. Archer*, 2 Anst. 478.

*Whitworth v. Davis*, 1 V. & B. 545.; and see *Bailey v. Vincent*, 5 Mad. 48. 18 Ves. 72.

(6) Mitford on Pleading, 142.; and see *Glassford v. Jeffery*, cit. 1 Ves. & B. 549.

Suits in  
equity.

charging a fraudulent bankruptcy, for the purpose of defeating the plaintiff's execution, as well as other circumstances of fraud, and praying a discovery and injunction,—a demurrer by the bankrupt was overruled. (1)

(1) *King v. Martin*, 2 Ves. jun. 641.; and see post, Chap. 13. s. 1.

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## CHAP. XIV.

## OF THE CERTIFICATE.

- SECT. 1. *Of the Signature of the Creditors.*  
 2. *Of the Signature of the Commissioners.*  
 3. *Of the Allowance by the Lord Chancellor; and herein of opposing the Allowance, and recalling the Certificate after Allowance.*  
 4. *Of the Practice on Petitions to stay the Certificate.*  
 5. *When the Certificate is void.*  
 6. *Effect of the Certificate.*  
 7. *Of pleading the Certificate; and herein of the Evidence to support it, or defeat it.*  
 8. *Of discharging a certificated Bankrupt.*  
 9. *Of the Bankrupt's Liability on a new Promise.*

## SECTION I.

*Of the Signature of the Creditors.*

By section 122. of the new statute, it is directed that the certificate (1) shall be signed by *four-fifths* (2) in number and value of the creditors, who have proved debts to the

(1) The 4 & 5 Ann. c. 17. s. 19. was the first statute that gave to the bankrupt the benefit of a certificate of conformity; but the power of granting it was vested in the commissioners alone; the Ann. c. 22. afterwards required the consent of the creditors. The G. 1. c. 24. s. 16. incorporated both these requisites, which were subsequently included in the 5 G. 2. c. 30. s. 10.

(2) This is the same proportion as that specified in the 5 G. 2. c. 30. s. 10. which was altered by the 4<sup>th</sup> G. 3. c. 121. s. 18. to the proportion of *three-fifths*; an alteration, which, without any qualification as to the period of applying for the certificate, was productive in its effects of much more evil than of benefit, increasing both the number of fraudulent bankrupts and defrauded creditors.

Signature  
by cre-  
ditors.

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amount of 20*l.* or upwards. But after *six calendar months* from the last examination of the bankrupt, it may then be signed either by *three-fifths* in number and value of such creditors, or by *nine-tenths* (1) in *number* only. If there happens to be a fraction in calculating the number of creditors, whose signatures are requisite, it seems that an additional creditor must sign in respect of that fraction. Thus, if seventeen creditors have proved; — as three-fifths of seventeen are equal to ten and one-fifth, and as ten would be less than three-fifths, though eleven is something more, yet eleven must sign; and so, in like manner, of every other number not exactly divisible. (2)

Where  
creditor  
may sign  
by power  
of attor-  
ney.

If a creditor lives remote, or abroad, he may authorize any other person by letter of attorney to sign the certificate on his behalf; but the authority of the creditor in the latter case must be attested by a notary public, British minister, or consul; and every such authority and attestation (3) must be laid before the Lord Chancellor, previous to the allowance of the certificate.

Creditors  
required  
to add the  
date of  
their sig-  
natures.

By a general order of Lord Eldon (4), the creditors are directed, at the time of signing the certificate to write opposite their respective names the day of the month and year on which they sign; and in all affidavits of their signatures, such day must be expressly stated. This order, however, is not so strict as not to be occasionally dispensed with, in a case of inadvertence satisfactorily explained to the Lord Chancellor. Thus, where a certificate was opposed, on the ground that some of the creditors (who had signed it) had not subscribed opposite

(1) A new provision was introduced in the very short lived act of the 5 G. 4. c. 98. s. 120. by which, where there was only *one* opposing creditor, whose debt was of such an amount as to stop the certificate, the Lord Chancellor might, upon petition, allow it notwithstanding such opposition. This enactment, however, was disap-

proved of by Lord Eldon, when it came into practical operation; in consequence of which, it seems to be purposely omitted in the provisions of the present statute.

(2) 1 Christ. B. L. 338.

(3) The letter of attorney, and the attestation, should be left at the bankrupt office.

(4) 8th August, 1809.

to their signatures the day of the month and year — which was done, in fact, by the witness who attested the signatures — and it appeared that the omission proceeded through the inadvertence of the witness, who had afterwards (but before the commissioners signed) inserted such dates, which were known to him by means of daily memorandums; — Lord Eldon thought, that this afforded ground for dispensing with the strict requisition of the order. (1)

Signature  
by cre-  
ditors.

The bankrupt is entitled to the inspection of the proceedings under the commission, for the purpose of ascertaining the debts proved, with a view to solicit his creditors to sign his certificate. (2)

Bankrupt  
entitled to  
inspect  
proceed-  
ings.

The certificate should not be signed by any creditor, previous to the bankrupt passing his last examination; for that would be contrary to the meaning of the act, which says, the bankrupt is not to be discharged from his debts, until he has “in *all things* conformed himself to the laws in force concerning bankrupts;” — and before he passes his last examination (which is one of the principal duties required of him) it would be impossible for the commissioners, notwithstanding the consent of the creditors, to certify that the bankrupt had so conformed himself. If, therefore, the certificate is signed by any creditor before the last examination, it will be sent back by the Lord Chancellor, and must be signed afresh both by such creditor and the commissioners. (3)

Certificate  
should not  
be signed  
before last  
examin-  
ation.

There is no way of *compelling* creditors to sign the certificate; who have the right of exercising an absolute discretion on the subject (4) — being under no *legal*, though they may sometimes be under a *moral*, obligation in this respect. (5) Indeed, they are often (for their own interests) too ready to afford the bankrupt that relief, which the law has, in this instance, left entirely in their hands to grant,

Creditors  
not com-  
pellable to  
sign cer-  
tificate.

(1) *Ex parte Laing*, 1 G. & J. 348.

(4) Per Lord M. Robson *v. Calze*,

(2) *Ex parte Morgan*, 1 G. & J. 404. Doug. 229.

(5) 18 Ves. 342.; and see 11 Ves.

(3) *Ex parte Brown*, 1 Rose, 176. 11 Ves. 424. 1 Rose, 189. 3 V. & B. 103.

Signature  
by cre-  
ditors.

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or refuse. And (as Lord Eldon well observed in *Ex parte King* (1)) there can be no stronger proof of the good nature and humanity of the British character, than the readiness with which creditors sign a bankrupt's certificate, before they know even whether he has made a full disclosure of his effects.

Creditor  
cannot  
sign, when  
not en-  
titled to a  
dividend.

The certificate must not be signed by a creditor not entitled to a dividend under the commission; such as (for instance) a creditor upon a bond of indemnity who has not been damnified; and, though such a creditor may have been improperly admitted to prove, yet he has no right deducible from such proof to sign the certificate. (2) Where a creditor after proving has assigned his debt, the late Vice-Chancellor thought that he could not sign the certificate without the authority of the assignee. (3) But Lord Eldon afterwards ruled the contrary, holding that the assignee, whose interest does not accrue till subsequent to the commission, has no control whatever over the certificate. (4)

One part-  
ner may  
sign;

but not  
one trust-  
ee.

One partner may sign a certificate for himself and his copartners (5), even though the partnership has (since the proof of the debt under the commission) been dissolved. (6) But one of several trustees is not competent to sign the certificate for himself and his co-trustees. (7)

Receiver  
cannot  
sign.

A receiver appointed to prove and receive dividends, it seems, cannot sign the certificate; though he may petition to stay it. (8)

As to an  
executor.

The executor of a creditor (who has died since the proof of his debt) may sign the certificate. But if the executor has also proved a debt in his own right, he cannot sign the certificate twice; for, both being debts to him individually in point of law, he can only be regarded as a single creditor. (9)

(1) 11 Ves. 424.

(2) *Ex parte Buckner*, 1 C. B. L. 462.

(3) *Ex parte Taylor*, 1 G. & J. 399.

(4) *Ex parte Herbert*, 2 G. & J. 66.

(5) *Ex parte Hodgkinson*, 19 Ves. 293. *Ex parte Mitchell*, 14 Ves. 597.

(6) *Ex parte Hall*, 1 Rose, 2. 17 Ves. 62.

(7) *Ex parte Rigby*, 2 Rose, 324.

(8) Per Lord Eldon, *ex parte Shaw*, 1 G. & J. 151. *Ex parte Evans*, 1 Mont. B. L. 252.

(9) *Ex parte Sammerz*, 1 Atk. 84. *Ex parte Stracey*, 1 Rose, 66.

Executors should not sign a bankrupt's certificate, without previously consulting the *cestui que trusts*; and if the latter are infants, and therefore not capable of giving consent, there seems to be some hazard (when no dividend is paid under the commission) in the executor, of his own authority, taking upon himself to absolve the bankrupt from all further (1) demands. The signature of one executor will (as in the case of partners) bind his co-executor. (2)

Signature  
by cre-  
ditors.

Executors  
should not  
sign with-  
out con-  
sent of  
*cestui que  
trusts*.

If the bankrupt himself becomes the executor of a creditor, who was entitled to sign the certificate, it has been said, that he himself might in that capacity sign *his own* certificate. (3) But, if the creditor dies before proving his debt, it is now settled, that the bankrupt executor *cannot prove* under his own commission, *without an order* of the Lord Chancellor; and, consequently, cannot (without such order) sign his own certificate. (4)

Where  
bankrupt  
executor  
of a credi-  
tor.

The proof of the *petitioning creditor* at the opening of the commission does not entitle him to sign the certificate, without proving also at a public meeting. (5)

As to  
petitioning  
creditor.

If any of the creditors are induced by money, given either by the bankrupt himself, or by a third person, to sign his certificate, the money may be recovered back, and the certificate will be void on the ground of fraud generally—though there is no express provision to this effect in the statute. (6) For, since many creditors are prevailed on to sign, because others have done so before, whom they suppose to be upon a par with themselves—if the first creditors, therefore, are in reality paid for signing, it would be a cheat upon those who have received nothing, and who sign the certificate trusting to the integrity of the previous

Money  
given to a  
creditor to  
sign ren-  
ders certi-  
ficate void.

(1) *Powell v. Evans*, 5 Ves. 839.

(2) *Ibid.*

(3) *Cowper's case*, Green, 260.

(4) *Ex parte Shaw*, 1 G. & J. 151. *Ex parte Marshall*, 1 G. & J. 163. n.

(5) *Ex parte Davis*, 2 Cox, 398.

(6) It is somewhat singular, that the 125th section (which will be presently noticed) should apply only to *contracts, or securities*, for the payment of money, and not to the *actual payment* of money.

*Signature by creditors.*

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signatures. And, indeed, whether such creditors sign first, or last, it is apprehended, that such a transaction would be contrary to the whole spirit of the bankrupt law; which is intended to prevent any one creditor from gaining an unfair advantage over another. (1) Even if the money is to be divided among all the creditors (2), or is paid by a third person without the privity of the bankrupt (3), the certificate will be equally void; since great corruption, and oppression, might arise from a combination of all the creditors to exact conditions for their signatures. (4) When any near relative, for instance, is induced through compassion to pay the money for the bankrupt, this is an unworthy advantage taken by the creditor to extort money, as a price for doing what he ought to do voluntarily, if the bankrupt has dealt fairly with his creditors. On the other hand, if the bankrupt has been guilty of any fraud or concealment, the creditor ought not to sign for any consideration whatever. And, although the other creditors (who have signed) would be sufficient in number and value to give the certificate validity, without reckoning the one who takes money for his signature — yet the certificate will be equally bad; for his example may have induced the others to sign. (5)

*When money given without the knowledge of the bankrupt.*

It may, on the first view, seem a hard case upon the bankrupt — when a third person, without the least knowledge on his part, gives money to obtain a creditor's signature — that the certificate should for this reason alone be held void. (6) The principle, on which this doctrine is founded, is, that although the bankrupt shall not be punished for the fraud

(1) *Phillips v. Dicus*, 15 East, 248. *Robson v. Cake*, 1 Doug. 228. *Smith v. Bromley*, ibid. 696.

(2) *Jones v. Barkley*, 2 Doug. 695. note (5).

(3) *Holland v. Palmer*, 1 Bos. & P. 95. *Ex parte Butt*, 10 Ves. 359.

(4) Per Lord M. 2 Doug. 698.

(5) 15 East, 248. Mr. Montagu, and Mr. Eden, both justly remark, that it may be inferred from this reasoning, that if there were suffi-

cient creditors without the creditor who had been so induced to sign, and it appeared that the signature of such creditor was subsequent to that of the others, so that they had not been induced to sign by his example, the certificate in that case would not be actually void. 1 Mont. Dig. 536. Eden's B. L. 385.

(6) 1 Doug. 228. 10 Ves. 359.



of a third person, yet he shall not avail himself of it. (1) But, though the bankrupt is prevented from deriving any benefit from a certificate, to which the signature of a creditor has been thus obtained, yet he will not be precluded from procuring *another* certificate sufficiently signed, without the signature of the creditor who had received the money; and the Lord Chancellor will, in such a case (upon the application and affidavit of the bankrupt) assist him in so doing, by ordering the first certificate to be cancelled, that he may be enabled to procure a fresh one. (2) And Lord Mansfield said in a case of this kind — if there were creditors enough who would sign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to sign, for the mere purpose of preventing the bankrupt from receiving any benefit from the certificate, — that this would be a fraud on the bankrupt, and would not hurt him.

Signature  
by creditors.  
————

If a creditor is even induced by money to *withdraw* a petition presented against the certificate — or after such a petition sells his debt, with an agreement to withdraw his petition, — this will also avoid the certificate; and in order to prevent such practices, (which, it seems, were at one time not unfrequent) petitions against a certificate are now not permitted to be withdrawn, as a matter of course. (3)

Where a creditor for money withdraws a petition.

But if creditors are induced to sign the certificate, for the sole purpose of rendering the bankrupt competent as a witness in an action brought by the assignees, the certificate, in this case, will not be considered illegal; for this is merely a mode of getting over a technical objection to evidence, by procuring a release from the bankrupt — and thus removing that interest, which would otherwise incapacitate him as a witness. (4)

Where creditors sign, merely to render the bankrupt competent as a witness.

(1) Ibid.

(2) Ex parte Harrison, 4 Mont. B. L. App. 36. Per Eyre C. J. *Holland v. Palmer*, 1 Bos. & P. 96.

(3) Ex parte Gibson, 1 C. B. L. 465. 6 Ves. 5.

(4) Selby v. Crew, 2 Anst. 504.

## SECTION II.

*Of the Signature of the Commissioners.*

Commissioners must certify bankrupt's conformity, &c.

By *section 122.* of the new act, it is declared, that no certificate shall discharge the bankrupt, unless the commissioners shall, in writing under their hands and seals, certify to the Lord Chancellor that the bankrupt has made a full discovery of his estate and effects, and in all things conformed himself to the law; and that there does not appear any reason to doubt the truth or fulness of such discovery; and also, that the creditors have signed in the manner directed by the act. The bankrupt is also required to make oath in writing, that such certificate and consent were obtained without fraud, previous to the allowance by the Lord Chancellor.

but must have previous proof of creditors' signatures.

And by *section 124.* the commissioners are directed not to sign the certificate, unless they shall have proof by affidavit in writing of the signature of the creditors thereto, or of any person thereto authorised by any creditor, and of the authority by which such person shall have so signed the same. If any creditor resides abroad, the authority must (as we have already seen (1)) be attested by a notary public, British minister, or consul.

Bound to certify as to certificate under a former commission, &c.

By a general order of Lord Apsley, the commissioners are directed to inquire, whether the bankrupt ever, and how long before, had obtained a certificate under any former commission, or had been discharged under any act for the relief of insolvent debtors; and in case they have reason to believe either the one or the other of these facts, the commissioners are directed to proceed upon such inquiry, and hear the evidence thereon in the presence of the bankrupt, who is to be informed of the subject of the inquiry, and to be at liberty to lay evidence before them relating thereto. And, in case any

(1) Ante, 564.

of such matters appear to the commissioners, they are directed, at the time of making their certificate, also separately to certify to the Lord Chancellor such of the said matters as they find to be true, and to transmit such separate certificate to the secretary of bankrupts, to be laid before the Lord Chancellor at the same time with the other certificate.

*Signature  
by com-  
missioners.*  
\_\_\_\_\_

By a general order of Lord Eldon (1), the signature and sealing of the certificate by the commissioners must be attested in writing by the solicitor to the commission, or some clerk of the solicitor — or by the messenger to the commission, or by some clerk of the commissioners. And, in order to avoid frauds upon the commissioners with respect to the certificate, a list is directed to be made and kept by the commissioners, or one of them, of all creditors above 20*l.*, who shall from time to time prove their debts, and of the amount of their respective debts; which list, as the same shall be from time to time made up, must be signed by three of the commissioners. The signature and sealing of *every one* of the commissioners must be attested pursuant to the directions of this order, otherwise the certificate will be sent back by the Chancellor. (2)

*As to attes-  
tation of  
certificate.*

The discretion of the commissioners, as to signing the bankrupt's certificate, is (like that of the creditors) subject to no control. They are pledged (by the sanction of an oath) to speak their real sentiments, arising from their observation upon the whole of the bankrupt's conduct; and they ought to be governed entirely by their own opinion, whether he has dealt fairly, or fraudulently, by his creditors. Indeed their jurisdiction, in this respect, is as distinct, as uncontrollable, and as much without appeal, as that of the Lord Chancellor himself; who, though he may render their certificate nugatory by withholding his confirmation, or recommend them to review their judgment, in case they

*Discretion  
of commis-  
sioners, as  
to signing,  
subject to:  
no con-  
trol.*

(1) 5th August, 1809.

(2) *Ex parte Jones*, 1 G. & J.  
186.

Signature  
by com-  
missioners.

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As to sup-  
plemental  
certificate.

Commis-  
sioners  
confined  
in their  
consider-  
ation of  
bankrupt's  
conduct.

Where  
proceed-  
ings are  
lost.

refuse to certify, yet he cannot exercise any controlling authority over them on this subject. (1) And where the commissioners had, on one occasion, given certain reasons in writing to the Lord Chancellor for refusing to sign the certificate, and the bankrupt petitioned that the commissioners should produce them, Lord Erskine dismissed the application. (2) A *mandamus*, therefore, will not lie to compel commissioners to sign a bankrupt's certificate. (3) And where a certificate has been signed by the commissioners, and is sent back to them by the Lord Chancellor for the purpose of letting in the proof of other creditors, the commissioners are not confined to that object; and if they cannot conscientiously and judiciously re-certify what they have certified before, they are not compellable to do so; neither are they bound by their former certificate. They may, therefore, in such case refuse to sign a *supplemental* certificate. It seems that the original and supplemental certificates are considered but as one act; the supplemental one giving the date to the whole; so that if the commissioners were to certify with reference to the subsequent proceedings, they would be understood to re-certify all that was contained in the original certificate. (4)

The commissioners, however, in examining the bankrupt's conduct previous to their signing his certificate, are confined to his conduct *since he became a bankrupt*—their duty being merely to consider, whether he has in their opinion duly conformed to the provisions of the statute. (5)

In a case where the proceedings under the commission were lost, and it appeared by the report of the commis-

(1) *Ex parte King*, 11 Ves. 417. 13 Ves. 181. 15 Ves. 126.

(2) 15 Ves. 182.

(3) *Ex parte John King*, 7 East, 92.; and see per Lord Hardw. *Ex parte Williamson*, 1 Atk. 82.

(4) *Ex parte King*, 15 Ves. 126. This bankrupt, of notorious me-

mory, applied upon four different occasions to two successive Chancellors, as well as the Court of King's Bench, to compel the commissioners to sign his certificate.

(5) 1 V. & B. 47, 48. 1 Rose, 190.

sioners, that the loss was not occasioned through any default of the bankrupt, — the commissioners were, upon the petition of the bankrupt, authorized by the Lord Chancellor to sign the certificate, after certifying a list of the creditors who had proved under the commission, pursuant to the directions of the general order. (1)

Signature  
by com-  
missioners.

### SECTION III.

*Of the Allowance of the Certificate by the Lord Chancellor ; and herein of opposing the Allowance, and recalling the Certificate after Allowance.*

When the certificate is signed by the commissioners, in order to be of any effect, it must be allowed and confirmed by the Lord Chancellor ; before which formality it is in law, considered as no certificate. (2) Previous to this proceeding, however, the bankrupt must make oath in writing, that the certificate of the commissioners, and the consent of the creditors were severally obtained without fraud (3) Every affidavit, authority, and attestation, also, as to the signature of the creditors (which are required to be exhibited to the commissioners before they sign the certificate) must be laid before the Lord Chancellor, along with the certificate, previous to its allowance. Notice must then be given in the Gazette, that the certificate will be allowed by the Lord Chancellor, unless cause is shown to the contrary, on or before a particular day (which must be above twenty-one days from the notice in the Gazette), and the certificate,

Previous  
affidavit of  
the bank-  
rupt.

Notice  
in the  
Gazette.

(1) *Ex parte Lushbrooke*, 1 Mont. Dig. 339.

(2) *Ex parte Sawyer*, 1 Rose, 141. 7 T. R. 296. *Ex parte Ansell*, 19 Ves. 208. The former statutes of 4 & 5 Ann. 5 G. 1. and 5 G. 2. enabled two of the Judges (as well as the Lord Chancellor) to allow and confirm the certificate, upon

the consideration of it being referred to them by the Great Seal ; but the practice of referring it to the Judges has for a long time become obsolete. (*Ex parte Saumarez*, 1 Atk. 84. 87.) The new act, also, contains no such provision.

(3) *Section 122.*

*Allowance  
by Chan-  
cellor.*

*When  
petition  
against  
certificate.*

*Certificate  
must be  
registered.*

*Certificate  
free of  
stamp  
duty.*

*Secretary  
of bank-  
rupts to  
search  
whether  
any former  
certifi-  
cates.*

*Chancel-  
lor's juris-  
diction as  
to the cer-  
tificate.*

must lie during that time in the Bankrupt office for allowance. If a petition is presented against the certificate on or before the day appointed for the allowance, it is immediately stayed, until the petition is heard by the Chancellor, which is set down to come on in the usual course. The petition should be served upon the bankrupt, that he may have an opportunity of answering the allegations contained in it; and, if the Chancellor eventually makes an order to stay the certificate, such order must be drawn up within three months, or the certificate will be allowed. (1)

As soon as the certificate is allowed by the Lord Chancellor, it should be entered of record at the Bankrupt office, and have a memorandum of such entry indorsed thereon by the proper officer, or his deputy, pursuant to the requisitions of the *ninety-sixth section* of the statute; otherwise it will not be receivable in evidence in any court of law, or equity.

By *section 98.* of the new act, the certificate as well as all other proceedings under a commission of bankrupt are now exempted from any stamp duty.

By a general order of Lord Apsley (2), when any certificate is brought to the secretary of bankrupts in order for allowance, he is directed to search for and certify to the Lord Chancellor, whether he can find any previous certificate having been before allowed to the same bankrupt.

There are no compulsory words in the statute to oblige the Lord Chancellor to allow the certificate, which is entirely a matter resting on his own judgment (3); though, at the same time, not quite arbitrarily so; as he must proceed by certain rules pointed out by the act of parliament, and established by a series of decisions in Bankruptcy. If these requisites are complied with, the Lord Chancellor ought to allow the certificate: if not complied with, or if there is ground for him to think that there is fraud or concealment on the

(1) Lord Loughborough's General Order, 22d March, 1796.

(2) 12th February, 1774.

(3) And see ante, 564. note (1).

part of the bankrupt, he may absolutely disallow it. (1) But, in considering the propriety of allowing the certificate, the authority of the Lord Chancellor, like that of the commissioners, is confined to the investigation of the bankrupt's conduct under the commission; and he has no power to take into his consideration any circumstance affecting the bankrupt, which is entirely unconnected with the bankruptcy. (2) In granting or withholding the certificate, however, the Lord Chancellor is influenced by a number of considerations, to which the commissioners are not to attend. (3)

Allowance  
by Chan-  
cellor.

If all the requisites have been complied with, previous to laying a certificate before the Lord Chancellor for his allowance, it may be allowed by him, even after the death of the bankrupt. (4) And where a joint certificate of two partners was duly signed by the creditors, and one of the bankrupts died before the commissioners certified their conformity; and the commissioners afterwards certified that the bankrupt had conformed, and that one of them died without making the usual affidavit of conformity; — upon the petition of the surviving bankrupt, the Lord Chancellor ordered, that the joint certificate should be inserted in the Gazette, as the separate certificate of the petitioner; and, that the same should be allowed and confirmed, as such separate certificate, if no cause should be shown to the contrary. (5)

In case of  
the death  
of bank-  
rupt.

Any creditor who has proved, or even been admitted a claimant (6) under the commission, and who has good grounds for opposing the allowance of the bankrupt's certificate, may do so by petition to the Lord Chancellor, although his debt does not amount to 20l. (7) For though a creditor under 20l. is excluded from assenting to, or

Who may  
oppose the  
allowance.

(1) Per Lord Hardwicke, 2 Ves. 249; 1 Atk. 82.

(2) Ex parte Gardner, 1 Ves. & B. 45.

(3) Ex parte King, 11 Ves. 421.

(4) Bromley v. Goodrich, 1 Atk. 77.

(5) Ex parte Currie, 10 Ves. 51. Ex parte Costart, 1 G. & J. 248.

(6) Ex parte Fyde, 1 Atk. 73. Ex parte Williamson, ibid. 81.

(7) Ex parte Allen, 7 Vin. 154. Section 122.

*Allowance  
by Chan-  
cellor.*  
——

dissenting from the certificate, yet as he is materially affected by the consequence of allowing it, he has a right to show any cause against its allowance. But, where there were accounts depending between certain parties and the bankrupt, and they would not swear to a balance in their favour, they were not allowed to petition (1) against the certificate.

*Mort-  
gagee.*

A *mortgagee* may petition to stay the certificate, if he has used due diligence to establish the amount of the probable debt (2); but, if he does not swear that he believes a balance will be due to him after the sale of the mortgaged premises, the petition will be dismissed. (3) And if there is a dispute, as to the probable amount of the balance, the certificate will be directed to be deposited in the Bankrupt office, subject to further orders. (4)

*Receiver.*

So a *receiver* appointed by the Court to prove and receive dividends, may petition to stay the certificate, though it is doubtful whether he can sign it. (5)

*Partner.*

The *partner* of the bankrupt may petition to stay the certificate, until the partnership accounts are taken, no want of due diligence being imputable to the petitioner. (6)

*When cre-  
ditor who  
has not  
proved,  
may peti-  
tion.*

A creditor, who has *not proved* his debt, may nevertheless petition that the certificate be stayed, in order to give him an opportunity of proving, and of assenting to, or dissenting from, the certificate — provided he gives a satisfactory reason for his not having proved before. (7) But where a creditor has been guilty of *laches*, in not proving his debt — though he omitted to do so upon the supposition, that he would be entitled to elect — he cannot petition to stay the certificate. (8) And where a creditor, eight months after the issuing of the commission, presented

(1) *Ex parte Johnson*, 1 Atk. 81.

(2) *Ex parte Whitchurch*, 1 G. & J. 71.

(3) *Ex parte Ramsbottom*, 2 Christ. 501.

(4) 1 G. & J. 71.

(5) Per Lord Eldon. *Ex parte Shaw*, 1 G. & J. 151. *Ex parte Evans*, 1 Mont. B. L. 332.

(6) *Ex parte Hadley*, 1 G. & J. 195.

(7) *Ex parte Adams*, 2 Bro. 48. *Ex parte Dyson*, 1 Rose, 67. note. *Ex parte Birch*, 1 Mad. 100.

(8) *Ex parte Bentley*, 2 Cox, 218. *Ex parte Warwick*, 14 Ves. 138.



such a petition, and did not account for the delay, the petition was dismissed with costs. (1) The Lord Chancellor, also, will not stay a certificate upon the petition of a creditor, who has no intention to come in under the commission, and who has the means of trying the validity of the certificate at law. (2)

*Allowance  
by Chan-  
cellor.*

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A creditor, who has taken the bankrupt in execution, has been permitted to petition to stay the certificate (3); but if the bankrupt is in custody, he must be discharged before he presents his petition, otherwise it will be dismissed with costs. (4)

When cre-  
ditor has  
taken  
bankrupt  
in execu-  
tion.

Any tampering of the petitioner with the bankrupt or his friends, is a sufficient preliminary objection to the hearing of a petition to stay a certificate; but, where a creditor believing the commission to be invalid, does not prove under it, but acted adversely, and declared to the bankrupt and his friends, that he meant to petition for a *supersedeas*, and also to stay the certificate, unless his debt was paid or satisfied; — this was held to be not such a tampering, as was sufficient to operate in bar of his petition. (5)

What a  
prelimi-  
nary objec-  
tion to  
hearing  
petition.

Creditors, who *have signed* the bankrupt's certificate, may, nevertheless, be heard against its allowance; and the allowance has been sometimes refused, and sometimes adjourned by the Lord Chancellor (6), even when there has been no opposition to the certificate.

Though  
creditors  
have sign-  
ed, may  
oppose  
certificate.

There are various grounds for *suspending* the allowance of the certificate, depending on the circumstances of each particular case: those for *refusing* it *entirely*, are specifically defined by the 130th section of the new statute, which in certain instances therein mentioned, says, that the bankrupt shall be wholly deprived of it. (7) In the first

Distinc-  
tion be-  
tween sus-  
pending,  
and alto-  
gether  
refusing  
certificate.

(1) *Ex parte Smith*, 1 G. & J. 195.

(5) *Ex parte Paterson*, 1 Rose.

(2) *Ex parte Dodson*, Buck. 225. 402.

(3) *Ex parte Joseph*, 18 Ves. 340.

(6) Per Lord M. Tudway v.

(4) *Ex parte Blaydes*, 1 G. & J.

*Bourne*, 2 Burr. 718.

179. *Ex parte Lord*, 2 Rose, 421.

(7) See post, Section 5.

*Allowance  
by Chan-  
cellor.*  
—

case, — though there may be cause for *suspending* the allowance, the certificate, *if granted*, will nevertheless be good ; in the last, where the statute positively says that the bankrupt shall not be entitled to it, the certificate will be invalid, notwithstanding the allowance by the Lord Chancellor. But in both cases, whether of suspension or refusal, the Lord Chancellor's power is subject to no appeal.

*Causes for  
suspension.*

Where there has been too much precipitancy in the signature of the certificate, either by the commissioners, or the creditors, the Lord Chancellor will suspend the allow-

*Precipitate  
signatures.*

ance of it. As, if it is signed by the creditors before the bankrupt passes his last examination, in which case (as has been already stated) (1), it will be sent back by the Lord Chancellor. (2) So where a certificate is signed so soon after the bankrupt's last examination, as to prevent the principal creditors (who lived abroad) from having time to inquire into the bankrupt's conduct, or to prove their debts, the allowance of the certificate will be of course postponed. (3) And Lord Hardwicke said, in a case of this kind, that he disapproved extremely of commissioners being so precipitate in signing certificates; for that such hasty proceedings inverted the very intention of the bankrupt acts, which were made in favour of creditors, but were too often abused for the service of insolvent persons. (4) After a full time, however, has been allowed a distant creditor for inquiry, and for sending an affidavit over to prove his debt, the certificate will be allowed ; for certificates are not to be locked up for ever, and the bankrupt deprived of that liberty which the law has given him. (5)

*Wrong de-  
scription.*

Where the commission is taken out under a wrong description, the certificate will be stayed, until proper advertisements have been inserted for the creditors. (6)

(1) See ante, 565.

(4) 1 Atk. 84.

(2) Ex parte *Browne*, 1 Rose, 176.

(5) Ex parte *Williamson*, 1 Atk. 82.

(3) Ex parte *Saunarez*, 1 Atk. 84. Ex parte *Lord*, 2 Rose, 421. Ex parte *Bararro*, 1 Rose, 266.

(6) Ex parte *Gibson*, 6 Ves. 5. Ex parte *Malkin*, C. B. L. 451.

If no dividend has been made of the bankrupt's effects, that is a strong reason for staying the certificate, but it is not a conclusive reason. In this respect, it seems that Lord Eldon and Lord Thurlow have differed from Lord Loughborough and Lord Erskine in their judgments; the two latter having, it is said, been of opinion, that it was a sufficient reason for staying the certificate. (1)

*Allowance  
by Chan-  
cellor.*

Where no  
dividend  
made.

A certificate has been refused to be stayed upon the petition of creditors in Scotland, stating that the bankrupt was properly the object of a sequestration, and that the question of sequestration was then depending in the Court of Session. (2) So if the debt of a creditor, who has proved under the commission, and signed the certificate, is not impeached, an objection to the proof in *point of time* is not sufficient to stay the allowance. (3) And where creditors, who had been admitted to claim debts under a commission, opposed the allowance of the certificate, and the bankrupt swore positively, that the balance, on taking the account, would be in his favour—and the claimants did not venture to swear that there would be any balance in *their* favour;—the Lord Chancellor refused to stay the allowance; for he said, that barely coming before the commissioners, and saying there is such a debt, is not sufficient without an affidavit, when opposed to the positive oath of the bankrupt. (4) Neither will a certificate be stayed, because there is a petition pending to supersede the commission; for a certificate must stand upon its own merits. (5)

*What not  
a good  
cause.*

Creditors  
in Scot-  
land.

Mere ob-  
jection to  
time of  
proof.

Mere  
claim op-  
posed to  
the oath  
of bank-  
rupt.

Petition to  
supersede.

Where new creditors prove their debts, after the certificate has been signed by the commissioners, it will not be stayed on this account—unless the new creditors themselves

New cre-  
ditors  
proving.

(1) *Ex parte King*, 11 Ves. 426.  
*Ex parte Cunningham*, 2 Mont. Dig.  
152.

(2) *Ex parte Cockayne*, 2 Rose,  
233.

(3) *Ex parte Stracey*, 1 Rose, 66.  
(4) *Ex parte Johnson*, 1 Atk. 81.  
*Ex parte Williamson*, 2 Ves. 249.

(5) *Ex parte Bonsor*, 2 Rose, 61.

*Allowance  
by Chan-  
cellor.*

*Trial  
pending.*

*Omission  
of com-  
missioners.*

*Bankrupt  
uncer-  
tified  
under  
former  
commis-  
sion.*

*State of  
bankrupt's  
accounts.*

*Retaining  
money as  
assignee.*

petition for that purpose, and make out a case of the certificate having been fraudulently obtained. (1)

A certificate, also, will not be stayed in order to give a creditor (who insists on a right to stop *in transitu*, and is waiting the result of a trial at law) an opportunity of proving under the commission, in case he should fail in his action. (2) Neither will it be withheld, because the commissioners have merely omitted to certify that the bankrupt has been a bankrupt before, in conformity with Lord Apsley's order. (3) So when the bankrupt is uncertificated under a former commission, that is no ground for staying the certificate; for though the second commission is absolutely void *at law*, yet, if circumstances required it, a court of *equity* would sustain that commission, and interfere to prevent the production of the first. (4)

It has been held likewise to be no ground for staying a certificate, that the bankrupt's accounts are in a slovenly state — unless, indeed, he has refused his assistance to explain, or elucidate, them. (5) But, when it appears that the bankrupt's statement on his examination is in itself inconsistent — as where he deposed, that he had no written documents except a book produced, which book appeared to have been compiled from other written documents — the Lord Chancellor, in such a case, will stay the certificate. (6) And, where the bankrupt's partner petitions that the certificate may be stayed, until the partnership account is taken, and there is no want of due diligence imputable to the petitioner, we have seen (7), that that is a good cause for making the application. (8)

It is no objection, however, to the allowance of the certificate, that the bankrupt has retained money in his hands, as

(1) *Ex parte Fydall*, 1 Atk. 73.

(2) *Ex parte Heath*, 6 Ves. 613.

(3) *Ex parte Black*, 1 Rose, 60. 117.

(4) *Ex parte Thompson*, 1 Rose, 285.

(5) *Ex parte Rawson*, 1 Rose, 67.

(6) *Ex parte Bangley*, 17 Ves.

(7) *Ante*, 578.

(8) *Ex parte Hadley*, 1 G. & J. 193.

assignee under another commission; for the statute provides a specific remedy (1) for that particular mischief. (2)

*Allowance  
by Chan-  
cellor.*

A certificate under a *separate* commission, lying for allowance before the Lord Chancellor, will not be stayed merely because a *joint* commission is issued; but if the certificate is fairly obtained, the Lord Chancellor will allow it; and, in order to give it effect, will impound the separate commission in the Bankrupt office, instead of superseding it — and will direct the proceedings and proofs to be transferred to the joint commission. (3)

*Issuing of  
a joint  
commis-  
sion.*

As to those cases, where the statute provides that the certificate shall be *void* (4), even though it is allowed — the Lord Chancellor is, of course, bound absolutely to refuse the allowance, if the opposing creditor adduces sufficient evidence before him to bring the bankrupt within any of those cases. But when the affidavits of the parties are in direct opposition to each other, Lord Eldon has generally allowed the certificate; because by refusing it, he said, the Court withholds an opportunity to try the fact by a jury. (5) Therefore, where a petition to stay the certificate alleged, that the bankrupt had acknowledged to have lost a particular sum by stock-jobbing transactions — and the bankrupt denied the loss on affidavit, though he admitted having made the acknowledgment, — the certificate was refused to be stayed; but the petition was dismissed without costs, as the acknowledgment was a justification of the petition. (6)

*As to dis-  
allowance  
of certi-  
ficate,  
where it is  
declared  
to be void.*

In a case, also, of *mere suspicion*, the Court will refuse to stay the certificate. (7) Thus, where a petition contained no other grounds of opposition, than that the party was *informed and believed*, that the bankrupt had concealed his effects, the petition was dismissed with costs. (8) For if the

*Mere sus-  
picion not  
a good  
ground for  
refusing it.*

(1) *Sections* 104, 105.

(2) *Ex parte Anderson*, 1 Rose, 93. B. 193. 1 Rose, 331.

(3) *Ex parte Tobin*, 1 Ves. & B. 308. 76.

(4) *Section* 130. post.

(5) *Ex parte Kennet*, 1 Ves. &

B. 193. 1 Rose, 331.

(6) *Ex parte Enderby*, 5 Mad.

(7) *Ex parte Hall*, 1 Rose, 3,

(8) *Ex parte Joseph*, 1 Rose, 184.  
18 Ves. 340.

*Allowance  
by Chan-  
cellor.*

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*When is-  
sue di-  
rected.*

certificate is allowed under such circumstances of conduct in the bankrupt, as make it bad in law, the allowance then becomes altogether a nullity; but if it be withheld by the Chancellor, the bankrupt has no other means of obtaining his certificate. (1) When, however, a creditor has proved his debt under the commission, which renders him unable to bring an action at law against the bankrupt to try the validity of the certificate, the Lord Chancellor frequently directs an issue, in order to determine the controverted fact. Thus, where such a creditor petitioned against the allowance of the certificate, on the ground of the bankrupt having lost money at a horse-race; and it appeared, from the bankrupt's last examination, that he had in fact subscribed to a stake to be run for at Bedenell races;—the Lord Chancellor in this case directed an issue to try the bankrupt's loss, in which the opposing creditor was to be plaintiff; and he ordered the bankrupt's last examination to be read upon the trial, with a declaration of the Chancellor's opinion, that under the statute it amounted to proof of gaming, unless it should be answered by other evidence. (2) But, where a petition imputed conduct to the bankrupt which amounted to felony, the Lord Chancellor would not in that case direct an issue to try the fact of the bankrupt's conformity; for the bankrupt would then be in a worse situation, than if the fact were tried by affidavits before the Chancellor, in which proceeding both parties are heard. (3)

*As to  
directing  
review of  
certificate.*

Upon a petition to stay the certificate, the Lord Chancellor frequently refers it back to the commissioners, that they may review it; but where the ground of opposition is, that a full discovery has not been made, this practice has been held to be improper. (4)

*As to cer-  
tificate of  
bankrupt  
uncerti-*

There is one exception in practice to the rule, that the Lord Chancellor will not allow a certificate, which (if allowed) would be clearly void in law—and that is, (as we

(1) *Ex parte Scott*, Buck. 279.

(2) *Ex parte Henderson*, Buck.  
557.

(3) *Ex parte Scott*, supra.

(4) *Ex parte Bangley*, 17 Ves.  
117. 1 Rose, 187. n.

may have already observed (1),) in the case of a certificate under a second commission, where the bankrupt has not got his certificate under the first. For, in this case, though the certificate (as well, indeed, as all other proceedings) under the second commission would be void at law, yet the Lord Chancellor will, under certain circumstances, sustain the second commission by preventing the production of the first, and will not refuse to allow the certificate under the second commission. (2)

*Allowance by Chancellor.*

—  
ficated under a former commission.

Where the application to stay the certificate was on the ground of concealment of property by the bankrupt, the circumstances attending which were afterwards (by the examination of the bankrupt and other persons) disclosed to the commissioners—but the whole property had been delivered up to the assignees before the signature of the certificate by the commissioners;—the Vice-Chancellor held that he ought not, in this case, to refuse the certificate, as the commissioners had thought fit to sign it, with a full knowledge of the facts. (3)

Court influenced by commissioners' signatures, though fraud imputed.

Where a bankrupt suffered *fictitious debts* to be proved, Lord Eldon (even before the passing of the new statute, which includes this as one of the causes for invalidating a certificate) declared that he never would in such a case allow the certificate. (4)

Fictitious debts.

*Keeping a Lottery Office* has been held to be no ground for opposing a certificate,—nor even the obtaining goods under false pretences (5); for except in the particular cases specified in the act, the certificate is affected only by the bankrupt's misconduct *under the bankruptcy*, and not *before* the bankruptcy takes place. (6)

(1) Ante, 582.

(2) Ex parte *Thompson*, 1 Rose, 285.

(3) Ex parte *Bryant*, 1 G. & J. 205. But quære, whether such a certificate would not be considered void under section 130.

(4) Ex parte *Shirley*, 2 Rose, 71. *Freydeburgh's case*, 3 Ves. & B. 142. Ex parte *Laffert*, 1 Rose, 350.

(5) Ex parte *Richardson*, 1 C. B. L. 463.

(6) Ex parte *Gardner*, 1 Ves. & B. 45.

*Allowance  
by Chan-  
cellor.*

*As to re-  
calling cer-  
tificate.*

When any *fraud* has been practised by the bankrupt upon the Great Seal, either in obtaining the certificate, or in the course of proceedings under the commission — which is not discovered until after the certificate has been allowed — the Lord Chancellor will in such a case *recall* it, if it can be done without injury to persons, who have been engaged with the bankrupt in subsequent transactions. (1) And so also, when any conduct of the bankrupt previous to the issuing of the commission is brought to light, which would of itself render the commission *void*. Thus where it appeared, that a bankrupt had, within a year before the commission issued, lost more by gaming in one day, than the sum then limited by the statute, Lord Macclesfield ordered the certificate to be recalled and disallowed. (2) So, where an imposition was practised upon the Great Seal, in the manner in which the certificate was lodged at the bankrupt office for allowance, — Lord Manners declared his intention to revoke the certificate, (though a period of *three years* even had elapsed since the allowance) if, upon inquiry before the commissioners, it was found that it could be done without injury to other persons. (3) And Lord Eldon also, in one instance, ordered a certificate to be recalled, which had been obtained *two years* before; — where it was discovered, that the commission had been issued *fraudulently* by the bankrupt — and that with his connivance debts had been proved under the commission, by the preponderance of which the certificate had been obtained. (4)

*Not recall-  
able in  
every case,  
where it*

The certificate however, when once obtained, cannot be got rid of in every case in which it might have been stayed. (5) Thus, where the opposing creditor had previously

(1) Davies, 437. *Ex parte Cawthorne*, 2 Rose, 186. *Ex parte Tellis*, 1 Ball & B. 321.

(2) Lord Cowper and Lord Talbot, then at the bar, afterwards gave opinions doubting the power of the Lord Chancellor to *recall* the certificate; but it does not

appear, that their opinions were ever acted upon. Whitm. 383.

(3) *Ex parte Tellis*, 1 Ball & B. 321.

(4) *Ex parte Cawthorne*, 2 Rose, 186. 19 Ves. 260.

(5) Per Lord Eldon, 6 Ves. 614.



failed to make out a case upon a petition to stay the certificate, and the bankrupt had been *six years* in the possession of it, and had been suffered to go into the commercial world, and involve himself and others in all the consequences of an extensive trade;—Lord Eldon refused to recall the certificate, notwithstanding there was strong suspicion of its having been obtained unfairly—and dismissed the petition with costs. (1) So, where a creditor, who had not proved his debt under the commission, applied to the Lord Chancellor after the certificate was allowed, for liberty to inspect all the bankrupt's books, suggesting that he had been guilty of gambling transactions—and the Lord Chancellor had ordered the secretary of bankrupts to look into the books for a particular instance, but none such was found;—Lord Eldon, upon counsel pressing for further inquiry, said he doubted very much, when a certificate had been allowed, whether a person, who was no creditor under the commission, could come in this way for a discovery, to obtain which he might file a bill—and refused the further inspection of the bankrupt's books, for the purpose of avoiding the certificate. (2) And, as a certificate will not (as we have seen) (3) be *stayed*, where the circumstances against the bankrupt amount only to strong *suspicion*, still less will it be *recalled* on that account; for there must be a *very clear* case established against him, to induce the Court to make an order of the latter description. (4)

*Allowance  
by Chan-  
cellor.*

—  
might have  
been  
stayed.

#### SECTION IV.

##### *Of the Practice on Petitions to stay the Certificate.*

Petitions to stay the certificate, like other petitions in bankruptcy (5), must, by a general order of Lord Eldon's,

Signature  
of peti-  
tioners.

(1) *Ex parte Read*, Buck. 430.

(4) *Ex parte Hood*, 1 G. & J.

(2) *Ex parte Mawson*, 6 Ves. 219.

614.

(3) See ante, 583.

(5) See General Order, 12th August 1809, and post, "Practice on Petitions."

*Petitions  
to stay it.*

Attest-  
ation.

be *signed* by all the petitioners before they are presented — except in cases of partnership, or absence from the kingdom; in the former of which cases, the signature of one of the partners will be sufficient; and in the latter case, the petition must be signed by the person presenting it on the behalf of the person so abroad. The signature of each person must, also, be attested by the solicitor actually presenting the petition, or by some person who must state himself in his attestation to be attorney, solicitor, or agent of the party signing. And the Lord Chancellor will not, unless under very special circumstances verified by affidavit, dispense with the strict observance of this order. (1) The object of requiring the attestation of a solicitor, is to have his pledge and responsibility to the propriety of the application. Where, therefore, the signature of the petition purported to be “*authenticated*,” not “*attested*,” by his solicitor — who, in fact, had not witnessed the signature, but merely put his name to it from a knowledge of the petitioner’s hand-writing — the Lord Chancellor thought, that the spirit of the order had in this instance been complied with. (2) But an attestation by the *agent to the solicitor* has been held to be not a compliance with the order. (3)

When to  
be pre-  
sented.

The court will not extend the time for receiving a petition for the disallowance of a certificate, which must be presented within the twenty-one days from the notice in the Gazette. (4) For where a motion was made on the last day, that a petition might be received only two days afterwards, (which in fact had been already prepared, but was not properly signed) the motion was refused. (5) And, though the allowance of a certificate may be delayed by a previous petition presented within the twenty-one days, yet if another petition to stay it is presented *after* the twenty-one days, though during the period of its suspension, it will be dismissed with costs. (6)

(1) Anon. 1 Rose, 97. Re *Bol-  
dero*, *ibid.* 231.

(2) Ex parte *Titley*, 2 Rose, 83.

(3) Ex parte *Weston*, 1 Mad. 75.  
Ex parte *Hirst*, 1 G. & J. 76.

(4) See ante, 576.

(5) Ex parte *Bennett*, 1 Mad.  
111.

(6) Ex parte *Wright*, 1 G. & J.  
352.

A petition to stay the certificate *prospectively*, that is, before the bankrupt has passed his last examination, it seems, cannot be supported. (1) *Petitions to stay it.*

A copy of the petition, with the Lord Chancellor's answer to it, must be *personally* served upon the bankrupt two clear days at the least before the petition day (2), otherwise the petition will be dismissed with costs. And, though the bankrupt even admits the receipt of a copy of the petition (3), or takes copies of the affidavits in support of it (4), or files affidavits in answer (5), or even appears to the petition by applying to the court to have the petition advanced in the Lord Chancellor's paper (6), — yet neither of these circumstances is a waiver of his right to be personally served. Neither is it a sufficient excuse, that the omission to serve the bankrupt in proper time was occasioned by the death of the creditor, and that his executor served it as soon as he was legally entitled to act. (7) When the bankrupt is not duly served with the petition, it is not necessary for him to take any notice of it whatever (8); but merely to present a *short petition*, praying that his certificate may be allowed (9); after which, he has a right to call for his certificate on the morning of the petition day. And, where the bankrupt unnecessarily extended this petition, by praying that the petition of the opposing creditor, which had not been duly served, might be dismissed with costs — and thus compelling the creditor to appear upon the hearing, — the Vice-Chancellor refused to give the bankrupt the costs of his petition. (10) The court will, however, where there is a difficulty of meeting with the bankrupt,

As to service of petition upon bankrupt.

(1) *Ex parte Groome*, Buck. 39.

(2) *Ex parte Harford*, Buck. 38.  
*Ex parte Hofley*, 1 G. & J. 63.  
 2 Jac. & W. 220.

(3) *Ex parte Furnival*, 1 G. & J. 254.

(4) *Ex parte Kendall*, 1 V. & B. 543. 2 Rose, 115.

(5) *Ex parte Harford*, *supra*.

(6) *Ex parte Groome*, Buck. 39.

(7) *Ex parte Coulbourn*, 2 Rose, 187.

(8) *Ex parte Kendall*, 1 V. & B. 543. 2 Rose, 115.

(9) *Ex parte Moore*, 1 G. & J. 253.; and see 2 Mont. B. L. 154.

(10) *Ibid*.

*Petitions  
to stay it.*

make an order (upon the application of the petitioner) that service of the petition at the bankrupt's residence shall be deemed good service, — provided the application is made before the petition day; and if the petitioner is prevented, by the conduct of the bankrupt, from making the application in proper time, and has used reasonable diligence, the court will then make such order, notwithstanding it is not applied for before the petition day. (1)

*Affidavit of  
service of  
petition.*

An affidavit of the *service* of the petition must be filed, not later than on the day of the hearing. Where the affidavit is imperfect, the court has permitted the petition to stand over for an hour for time to file another, and has afterwards directed it to be adjourned, in order to give the bankrupt time to answer; but if, under such circumstances, the second affidavit is not filed when the petition is adjourned, and is filed subsequent to the day of the hearing, it will then be treated as no affidavit, and the petition will be dismissed with (2) costs.

*Affidavit in  
support of  
it.*

An affidavit must also be made of the *truth* of the facts alleged in the petition; which latter must state all material facts, so as to make a *prima facie* case for staying the certificate; for the petitioner will not be permitted to supply the defect of his original case, by filing affidavits in reply. (3) And it is the general rule of the court, to construe the practice strictly, in favour of the certificate. (4)

*As to filing  
affidavits.*

By a general order of Lord Loughborough (5), qualified by one of Lord Eldon (6), all affidavits made in support of petitions presented against the allowance of a certificate, must be filed in the bankrupt office at the time when such petitions are left in the office, except such affidavits as are necessary to be made in *reply* to any affidavits made in answer to the petition. And no petition is to be received

(1) *Ex parte Harrison*, 1 G. & J. 71.

(2) *Ex parte Long*, 1 G. & J. 351.

(3) *Ex parte Cundall*, 1 G. & J. 37.

(4) 2 Mont. B. L. 154. and cases there cited.

(5) 12th April 1796.

(6) 16th November 1805.

against the allowance of any bankrupt's certificate, unless the affidavits in support of such petition are filed when the petition is left; in default of *which*, the certificate is to be forthwith (1) allowed and confirmed.

*Petitions  
to stay it.*

The term "*filing an affidavit*" is construed to mean the swearing and carrying it into the office. (2)

No affidavit, therefore, in support of a petition to stay a certificate, which is filed *after* the petition is presented, can be read at the hearing (3); such an affidavit being, from necessity, an exception to the rule applicable to affidavits on *other* (4) petitions in bankruptcy, viz. that an affidavit, sworn previous to the petition being answered by the Lord Chancellor, is inadmissible in evidence. (5)

With respect to affidavits *in answer*, the practice is, to hear the petition for staying the certificate, and then for the court to say (6), whether affidavits in answer are necessary. And if the bankrupt do not file his affidavits in answer till after the petition day, the petitioner against the certificate is entitled to have the petition stand over, that he may have an opportunity of replying to any new matter in the bankrupt's affidavits. (7)

*Affidavits  
in answer.*

There is one case, however, in which the strictness both of the order as to the filing the affidavit when the petition is presented, and of the general rule applicable to affidavits on other petitions, seems to have been in some degree departed from. For, where the time for presenting a petition expired on the 18th, and a petition was presented on the 16th and an affidavit filed — and on the 18th the petitioner gave notice to the bankrupt, that he intended to read some former affidavits made in the same bankruptcy, and among them, one of the bankrupt's himself — and the Chancellor's order to hear the petition was not made till after the 18th; —

*Where  
strictness  
of rule as  
to filing  
affidavits  
departed  
from.*

(1) And see *ex parte Bowes*,  
1 Ves. 540.

(5) *Ex parte Overton*, 2 Rose,  
257.

(2) *Ex parte Newton*, 2 Rose, 19.

(6) *Ex parte Gardner*, 1 Rose,  
378.

(3) *Ex parte Dodson*, Buck. 178.

(7) *Ex parte Radcliffe*, Buck.  
489.

(4) See *ex parte Northwood*,  
Rose, 246.

*Petitions  
to stay it.*

Lord Eldon was of opinion, that the notice being given before the *fiat*, it was in time — notwithstanding it was contended, that as no new affidavits could have been filed, and the notice was in effect the same as filing an affidavit, it was consequently too late. (1)

Petition  
cannot  
be with-  
drawn,  
without  
leave.

No petition to stay a bankrupt's certificate can be withdrawn without the leave of the court; which will not be granted, unless the parties presenting it make affidavit, that it is not withdrawn from improper motives. (2)

As to costs  
when peti-  
tion dis-  
missed.

Where a petition to stay or disallow a certificate is dismissed, it is generally dismissed with costs; but cases have occurred where such petitions have been dismissed *without* costs — on the ground, that although the bankrupt was entitled to his certificate, there were circumstances in his conduct which afforded suspicion of collusion, or which precluded all claim to the indulgence of the court. (3)

As to the  
hearing.

A petition to stay a certificate is an exception to the regular course of proceedings; and as the granting, or withholding, it is a question of such extreme importance to the bankrupt, it may be heard out of its turn, upon a special application for that purpose. (4) And where petitions have been presented in the vacation to stay certificates, upon the ground merely that the *petitioner's debt* would turn the certificate — and the bankrupt has contradicted that allegation; — Lord Eldon has referred it to the secretary of bankrupts, or the commissioners, to look into the proofs upon the proceedings — with a direction, that if the bankrupt were correct in his contradiction, the certificate should be allowed; his Lordship thinking, that this was a question which had a strong claim to the early attention of the court. (5)

Where  
petition  
presented  
in vaca-  
tion.

(1) *Ex parte Emmett*, 2 Mont. & B. 45. *Ex parte Stevens*, Buck. Dig. 153. 389.

(2) *Ex parte Gibson*, 6 Ves. 5. (4) *Ex parte Anderson*, 1 Rose, 1 C. B. L. 465.; and see ante, 569. 95.

(3) *Ex parte Black*, 1 Rose, 67. (5) *Ex parte Bank of Scotland*. note (a). *Ex parte Gardner*, 1 Ves. 1 Rose, 376. 1 V. & B. 6.

## SECTION V.

*When the Certificate is void.*

By section 130. (1) of the new statute, certain cases are specified, where the bankrupt is not only not entitled to his certificate, but where it is declared to be absolutely *void*, even after it is obtained. They are as follows :

1st. When he has lost by any sort of *gaming*, or *wagering*, in one day 20*l.* — or, within one year next preceding his bankruptcy, 200*l.* Insurance in the lottery was not considered as a gaming within the former bankrupt laws (2); but it is apprehended, that it would now come within the words “*any sort of wagering*” of the above section. And though the mere keeping a lottery office has been held to be no ground for invalidating the certificate (3), — yet, if the keeper of such office had contracted for any part of the lottery, it seems doubtful, whether this would not have been held such a sort of gaming, or wagering, as would come within the meaning of the above section. But these questions will not often occur again, as lotteries are so soon to be finally abolished by the legislature. Where a plaintiff gives evidence of gaming to avoid the certificate, he must elect, whether he will confine his evidence to one loss amounting to 20*l.* — or to several losses amounting to 200*l.* (4)

Gaming or  
wagering.

2dly. Where the bankrupt has, within one year next preceding his bankruptcy, lost 200*l.* (5) by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract; or where the stock bought, or sold, was not actually transferred, or delivered in pursuance of such contract.

Stock-  
jobbing.

(1) This is taken from 5 G. 2. c. 30. s. 7. 12.

(2) *Lewis v. Piercy*, 1 H. B. 29.

(3) *Ex parte Richardson*, 1 C. B. L. 463.

(4) *Hughes v. Morley*, 1 Holt, 520.

(5) The sum was 100*l.* in each of these cases by the 5 G. 2. c. 30. s. 12.

When  
void.

Destroying  
or falsify-  
ing books  
or ac-  
counts.

Conceal-  
ing prop-  
erty.

3dly. Where, after an act of bankruptcy committed, or in contemplation of bankruptcy, the bankrupt has *destroyed, altered, mutilated, or falsified*, or caused to be so done, any of his *books, papers, writings, or securities* — or made, or been privy to the making of, any *false or fraudulent entries* in any book of account or other document, with intent to defraud his creditors. (1)

4thly. Where he has *concealed property* to the value of 10*l.* or upwards. If a plaintiff, however, seeks to avoid a bankrupt's certificate, by proving concealment to the value of 10*l.*, the defendant may shew that the concealment was not wilful. (2) Where the bankrupt had secreted part of his effects — but the circumstances attending the concealment were afterwards, by the examination of the bankrupt and other persons, disclosed to the commissioners — and the whole property had been delivered up to the assignees *before the signature* of the certificate by the commissioners; — the Vice-Chancellor thought he ought not to stay the certificate on this ground, as the concealment meant by the 5 G. 2. c. 30. s. 7. was a concealment *at the time of signing* the certificate. (3) And if this decision is correct, there seems to be no reason, why the parallel clause of the new act (*section 130.*) should not receive the same construction.

Bankrupt  
being privy  
to proof of  
false debt.

5thly. Where, if any person proves a false debt under the commission, the bankrupt (being privy thereto, or afterwards knowing the same) shall not disclose the same to his assignees within one month after such knowledge. (4)

(1) This is a new provision of the present statute.

(2) *Cathcart v. Blackwood*, Dom. Proc. 1765.

(3) *Ex parte Bryant*, 1 G. & J. 205.

(4) This provision, which was in substance contained in the 24 G. 2. c. 57. s. 9. Mr. Eden says, has been strangely overlooked in proceedings on petition to oppose

the certificate; for where the bankrupt has permitted fictitious debts to be proved, the objection made to the certificate in consequence of such conduct, has often proceeded on the mere ground of its proving that he had not made a complete disclosure. *Ex parte Laffert*, 1 Rose, 380. *Ex parte Shirley*, 2 Rose, 71. *Freydeburg's* case, 3 Ves. & B. 142. The harsh



Under this provision, the persons so permitted to prove are admissible witnesses to prove the fraud. (1) *When void.*

Besides the above cases specified in the statute, there are also other instances in which the certificate (as we have already seen (2)) is held to be void in law, on the ground of *fraud*; namely, where money has been given to a creditor either by the bankrupt, or a third person, to induce him to sign it — or to withdraw a petition against it. (3) *Other cases.*

## SECTION VI.

### *Of the Effect of the Certificate.*

The certificate, when it is allowed by the Lord Chancellor, gives the bankrupt a general release in consequence of his certified conformity, discharging him from all debts due by him when he became bankrupt, and from all claims and demands proveable under the commission. (4) As to the different species of debts, therefore, which the certificate will operate in discharge of, the reader is referred to the respective heads in a former Chapter relating to the proof of debts. (5) *Discharges all claims proveable under the commission.*

The certificate, however, will not discharge any person who was a partner with the bankrupt at the time of the bankruptcy — or who was then jointly bound, or had made any joint contract with him. (6) Neither does a creditor, who signs the certificate of surviving partners, thereby *Does not discharge partners, or co-sureties.*

provision in the 5 G. 2. c. 30. s. 12. that a bankrupt should be excluded from the benefit of his certificate, if he had, upon the marriage of any of his children, advanced above 100*l.* — unless he could prove himself then solvent — is altogether omitted in the new act.

(1) *Edmonstone v. Webb*, 3 Esp. 264.

(2) *Ante*, 567.

(3) *Ex parte Gibson*, C. B. L. 465. 1 Mont. 336.; and see *ante*, 569.

(4) *Section* 121.

(5) *Ante*, 175.

(6) *Section* 121. This provision is taken from the 10 Ann. c. 15. s. 2.

Effect.

release the estate of a deceased partner. (1) So, though the certificate will discharge one of several covenantors for the payment of an annuity, it will not discharge his co-sureties from the claim of the annuity creditor. (2)

Privilege of proof and discharge of bankrupt co-extensive.

The privilege of creditors to prove, and of bankrupts to be discharged from debts, is, generally speaking, co-extensive and commensurate (3); and this principle is adopted by the new act, which (as we have just seen) provides that all claims and demands proveable under the commission shall be discharged by the certificate. There are only one or two exceptions to this general position of Lord Hardwicke; — but in this, as in other cases, *exceptio probat regulam*.

Exception; verdict after bankruptcy, in action on a contract.

One of these is, where a verdict in an action upon a *contract* is not obtained until after the bankruptcy of the defendant, in which case the costs resulting from the verdict and the judgment are not proveable under the commission — although they have been held to be barred by the certificate, as accessorial to the original debt. A plaintiff, therefore, who perseveres in an action against a bankrupt after the issuing of a commission, runs the risk of losing all claim against him for costs, — in case the debt, on which the action is brought, be barred by the certificate. (4) But, with the exception of a case of this description, debts proveable under the commission, and debts discharged by the certificate, may be said to be convertible terms. (5)

A discharge, as to surety paying debt, or sustaining damage, after bankruptcy;

Thus, a surety for the bankrupt, who pays the debt even after the issuing of the commission — as he is now permitted to prove it against the bankrupt's estate (6) — will be barred by the certificate. And he will not only be barred from suing the bankrupt, for the recovery of money paid in dis-

(1) *Sleech's case*, 1 Meriv. 570.

(2) *Baxter v. Nichols*, 4 Taunt. 90.

(3) Per Lord Hardwicke, 1 Atk. 119.

(4) *Willett v. Pringle*, 2 N. R. 196.; and see Lord Eldon's judg-

ment in *ex parte Hill*, 11 Ves. 649.; and that of the Vice-Chancellor in *ex parte Poucher*, 1 G. & J. 386.

(5) *Bamford v. Burrell*, 2 B. & P. 11.

(6) Section 52.

charge of the debt — but also from suing him for any consequential damage, accruing from the nonpayment by the bankrupt of such debt. As, where an acceptor of an accommodation bill brought an action against the drawer (who had become bankrupt) for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, — the certificate was, in this case, held a good bar to the action. (1) But the certificate will only discharge the bankrupt from the claims of the surety, as to those debts which the bankrupt *owes at the time* of his bankruptcy; therefore, where a surety for payment of the bankrupt's rent paid arrears which *became due after the bankruptcy*, the certificate was held no bar to an action against him by the surety for repayment of such arrears. (2)

Effect.

but only  
for debts  
actually  
owing at  
time of  
bank-  
ruptcy.

The certificate, however, does not discharge a bankrupt from a debt due to the *Crown*; for as the Crown is not bound by any statute, unless specifically named (3) — and the *King's debt* is not mentioned, among those of the creditors in general, in any part of the statute relating to the proof of debts or the certificate, — the Crown, of course, will not be barred of the peculiar privileges it possesses for the recovery of its own debts.

Certificate  
does not  
bar the  
crown;

Nor is a bankrupt discharged by his certificate from his own express *collateral* covenant of indemnity, which is *not broken before his bankruptcy*, unless, indeed, there can be a value set upon the subject matter of it under the *56th section*. Therefore, where the bankrupt covenanted to indemnify the assignor against covenants contained in a lease, which was assigned to the bankrupt before his bankruptcy, — it was held, that as this was a distinct and collateral cove-

nor dis-  
charge a  
collateral  
covenant,  
or bond  
of indem-  
nity.

(1) *Vansandan v. Corsbie*, 3 B. & A. 13. *Wood v. Dodgson*, 2 M. & S. 195.

(2) *M'Dougal v. Paton*, 8 Taunt. 195.

584. 2 Moore, 644.; and see ante, Chap. IX. Sect. 21.

(3) *Rex v. Pisley*, Bunb. 202.

1 Atk. 262.

**Effect.**

nant, in respect of which the assignor could have no remedy under the commission, — the bankrupt was not discharged by the certificate. (1) And in a similar case, where the bankrupt gave a bond of indemnity to the lessee — which was in fact forfeited before the bankruptcy by rent becoming in arrear, but the lessee had not actually paid the rent to the lessor, — it was held, that the certificate was no bar to the claims of the lessee — on the ground that a bond of indemnity against breaches of covenant is incapable of valuation, it being impossible to calculate how far the obligee may be damaged by any future breaches; and that the bond, therefore, in this case could neither be proved in respect of the penalty — nor could the lessee prove in respect of the rent in arrear, without having first paid it to the lessor — even if such a partial proof under a bond of indemnity could in strictness be admitted. (2)

Certificate not an absolute protection against liability on a lease; unless assignees accept the term;

or the bankrupt deliver the

The certificate also does not, *of itself*, protect the bankrupt from an action of covenant, or assumpsit, by a lessor for non-payment of rent due after the bankruptcy — for which he has become liable either as lessee (3), or even as assignee of the lessee. (4) But by the 75th section of the new statute it is declared, that any bankrupt entitled to any lease, or agreement for a lease, if the *assignees accept the same*, shall not be liable to pay any rent accruing after the date of the commission; or be sued in respect of any subsequent non-observance, or non-performance, of the conditions, covenants, or agreements therein contained. (5) And if the assignees decline the same, then the bankrupt will not be liable, in case he deliver up such lease or

(1) *Mayor v. Steward*, 4 Burr. 2446. *Ludford v. Barber*, 1 T. R. 86.

(2) *Taylor v. Young*, 3 B. & A. 521. 8 Taunt. 318. 2 Moore, 326.

(3) *Mills v. Auriol*, 1 H. B. 433. 4 T. R. 94. *Boot v. Wilson*, 8 East, 311.

(4) *Copeland v. Stephens*, 1 B. & A. 593.

(5) This provision was first introduced into the bankrupt law by the 49 G. 3. c. 121. s. 19. but the following part of it is new, and seems but a just provision to relieve the bankrupt from his liability, in case the assignees refuse the lease. As to what will amount to an acceptance of the lease by the assignees, see ante, 395.

agreement to the lessor, or to such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid. This section, however, only applies to cases between the lessor and lessee, and does not extend to cases between the lessee and the assignee of the lease. Therefore, where an assignee of a lease gives a bond of indemnity to the lessee to protect him from the future non-payment of the rent, or non-performance of the covenants, and afterwards becomes bankrupt, — his certificate will not, as we have just observed, protect him from an action on the bond by the lessee, even though the breach declared upon took place before the bankruptcy. (1)

*Effect.*

lease up to the lessor.

Exception only extends to cases between lessor and lessee.

There must be some *express act* done by the assignees to manifest their assent to the assignment as it regards the term, and their acceptance of the lease; for the general assignment of the bankrupt's personal estate under the commission does not, without such acceptance on their part, vest a term of years in the assignees. (2) Therefore, until some act of this sort is done by them, the term still remains in the bankrupt, even though he was but himself the assignee of the lease; and his certificate will not protect him from the payment of rent accruing due subsequent to the bankruptcy. (3) If the assignees decline to take the lease, the bankrupt can (as we have seen) now exonerate himself, by delivering up the lease to the lessor within fourteen days after notice of the assignees' declining it. But, if the assignees neglect to determine whether they will accept, or decline it, there is no express power given by the statute to the bankrupt (as there is to the lessor) to

An express act of the assignees necessary to shew they assent to take the lease.

When assignees neglect to determine.

(1) *Taylor v. Young*, 5 B. & A. 521.

(2) This does not appear to have been formerly the doctrine held by the courts, which inclined to the opinion, that the commission and the proceedings under it actually dispossessed the bankrupt of his whole estate, transferring and

vesting it absolutely in the assignees under the commission. *Mayor v. Steward*, 4 Burr. 2443. per Yates J. *Cantril v. Graham*, Barnes, 69. *Wadham v. Marlowe*, 8 East, 314. note (c.) Per Lord M.

(3) *Copeland v. Stephens*, 1 B. & A. 591.

Effect.

apply to the Lord Chancellor for an order on the assignees, to elect whether they will take the lease or not; though there seems to be no reason why the Lord Chancellor should not, under his general jurisdiction in bankruptcy, as well indeed as under the equity of the statute, have power to make such an order, when circumstances call for it on the part of the bankrupt.

Bankrupt's liability as lessee, once got rid of, not renewed.

As the certificate discharges the bankrupt from all covenants in the lease, if the assignees accept it—his liability to the lessor will not be renewed (except as an assignee of the term), though he comes into possession of the premises afterwards under an assignment from his assignees. Thus, where A. granted a lease to B., which contained a covenant that B. should not underlet without the consent of A.—and B. having become a bankrupt, his assignees assigned the premises to C., who re-assigned them to B. after he had obtained his certificate—after which B. underlet the premises to another person;—it was held, that B. having been discharged by his bankruptcy from all the covenants as lessee, the underletting by him was no (1) forfeiture of the lease.

Quære as to certificate discharging bankrupt from payments made on cross acceptances.

Where two parties exchanged acceptances, and both became bankrupt at a time when all the bills were in circulation—and the assignees of one party, besides paying dividends to the full amount of that party's acceptances, had also paid dividends on account of the acceptances of the other,—the Court of King's Bench were equally divided in opinion on the question, whether the assignees could maintain an action to recover such surplus dividends from the other party, notwithstanding his certificate. (2)

No discharge of a promise to pay a weekly sum for an illegitimate child;

The certificate has been held no discharge to a bankrupt from an action of *assumpsit*, on a promise to pay the plaintiff a weekly sum for the support of the bankrupt's illegitimate child, except as to the arrears accruing *before* the bankruptcy; for the promise was considered to be of such a

(1) *Doe v. Smith*, 1 Marsh. 359.  
5 Taunt. 795.

(2) *Cowley v. Dunlop*, 7 T. R.  
565.

agreed to the law, & to the purpose of proof; the future arrears, there-  
not proveable under the commission, were of  
discharged by the certificate. (1) So the certi-  
discharge of a bastardy bond, as to the bank-  
y for further expenses, incurred by the parish  
quently to the bankruptcy (2); for this is not  
of an annuity, which can be set a value upon,  
an estimate is made only of the duration of life;  
case, the expenses for which the party is liable  
a consequence of the sickness of the child; and  
ency will be, not only the duration of life, but  
inuance of health, which is subjected to every  
human life, and the most precarious and un-  
ant possible.

tificate, as we have seen (3), has no operation  
allowed by the Lord Chancellor; nor has it,  
wed, any relation back to an earlier period.  
acy (as has been before stated (4)), which devolves  
ankrupt pending a petition to stay the certificate,  
ne petition was in fact unfounded, and the certi-  
s afterwards allowed, goes to the assignees; unless,  
the petition was presented with the *express object* of  
g the certificate. (5)  
hough the bankrupt's *bail* will be discharged, if he  
his certificate before they are fixed, yet they will  
discharged if they are fixed before the certificate is  
d; for in that case a new debt arises, which is their  
proper debt, distinct from the original debt of the  
upt, and therefore not discharged by the discharge of  
iginal debt. (6) Formerly, where the bankrupt ob-  
d his certificate pending an action against him, before

*Effect.*

or of a  
bastardy  
bond.

Certificate  
has no  
operation  
until ac-  
tual allow-  
ance;  
nor any  
relation  
back.

As to dis-  
charge of  
*bail*.

Mode of  
proceed-  
ing.

*Miller v. Whittenbury*, 1 Camp.

(4) Ante, 385.

*Overseers of St. Martin in  
Fields v. Warren*, 1 B. & A. 491.

(5) Ex parte *Ansell*, 19 Ves. 208.

ar. 188.; and see *Davies v.  
Holt*, 3 Bing. 154.

(6) *Woolley v. Cobbe*, 1 Burr.  
244. *Cockerill v. Owston*, ibid. 436.  
*Walker v. Giblett*, Bl. 811. *Mannin  
v. Partridge*, 14 East, 599. *Sta-  
pleton v. Macbar*, 7 Taunt. 589.

3) Ante, 575.

**Effect.**

the bail were fixed, the practice was for the bail to surrender the defendant — and then for him to apply to be discharged, upon an affidavit stating the fact of his having become a bankrupt since the cause of action arose, and having since obtained his certificate. But now, where a bankrupt is clearly entitled to his discharge, the courts (or a judge on summons) to avoid circuitry, will order an *exoneretur* to be entered on the bail-piece without the form of a regular surrender. (1) If the bail do not apply to enter an *exoneretur* till after the money is levied upon them, they can only be relieved upon payment of costs. (2) And the courts will not wholly exonerate the bail, without giving the plaintiff in the action an opportunity of trying by an issue, whether the certificate was fairly obtained (3); but they will not grant an issue to try the fact of the bankrupt being a *trader*; for the certificate itself is, by the statute (4), made evidence of the trading. (5) In the case of a foreign certificate, however, they will direct an issue to ascertain the circumstances under which the debt was contracted, from which the bail contend to be discharged. (6) The proper mode for the bail to avail themselves of the certificate of their principal, when they are sued upon their recognizance, is not to plead such certificate in their discharge — but to apply for relief to the summary jurisdiction of the court. (7) Bail in *error* are not entitled to relief, although the bankrupt obtains his certificate pending the writ of error; for bail in error cannot (like bail to the action) surrender their principal in discharge of their liability. (8) Neither are bail of any description discharged by the bankrupt's certificate under a *second commission*,

When an  
issue will  
be granted.

As to bail  
in error.

When bail  
not dis-  
charged by

(1) *Palmby v. Masters*, Barnes, 368. *Martin v. O'Hara*, Cowp. 823. 1 Tidd. Pract. 280. *Todd v. Masfield*, 3 B. & C. 222.; and see post, "Of Pleading the Certificate."

(2) *Mannin v. Partridge*, supra.

(3) *Woolcot v. Leicester*, 6 Taunt. 75.

(4) Section 126.

(5) *Harmer v. Hagger*, 1 B. & A. 332.

(6) *Bamfield v. Anderson*, 5 Moore, 331.; and see post, 530.

(7) *Donnelly v. Dunn*, 2 Bos. & P. 45. *Beddome v. Holbrooke*, 1 Bos. & P. 450. note (b).

(8) *Southcote v. Braithwaite*, 1 T. R. 624.



where he has not obtained his certificate under the first; **Effect.**  
 for as a second commission against an uncertificated bank-  
 rupt is void, a certificate under such a commission will not  
 entitle the bankrupt to be discharged, and the bail can  
 never be in a better situation than the principal. (1)  
 -----  
 certificate under a second commis-  
 sion.

Where a bankrupt has obtained his certificate, he is  
 competent to justify as bail in an action; his recent bank-  
 ruptcy being not of itself an objection to his so doing. (2)  
 Certificate enables bankrupt to justify as bail.

The effect of a certificate under an English commission  
 of bankrupt, upon a debt contracted in a *foreign* country —  
 and the effect also given here to a *foreign* certificate, with  
 respect to a debt contracted either abroad, or in England —  
 are questions of a very complicated nature; and involve  
 many considerations of international law, which, it is far  
 beyond the scope of the present treatise, to discuss in the  
 manner due to the importance of the subject. The cases,  
 which are to be met with in the books, principally relate to  
 the operation of a *foreign* certificate in *this* country — in-  
 stead of the effect produced by an *English* certificate upon a  
*foreign* debt — this last question, however, being one that  
 is more immediately connected with the object of the pre-  
 sent work.  
 As to discharge of a *foreign* debt under an English certificate, or vice versa.

A certificate obtained under an *English* commission of  
 bankrupt, as it now discharges the bankrupt from all claims  
 and demands made proveable under the commission (3),  
 will operate (as it should seem) in *this* country at least, to  
 discharge any debt contracted abroad — provided the debt  
 was a proveable debt, and the foreign creditor had an *op-*  
*portunity* of proving it under the commission. And upon  
 this principle, it is said to have been determined by the  
 court of session in *Scotland*, that a certificate under an  
*English* commission would be a discharge *there* of every  
 debt that could be proved under the commission, whether  
 Certificate under English commission,  
 a discharge in Scotland.

(1) *Martin v. O'Hara*, Cowp.  
 825.

(2) *Smith v. Roberts*, 1 Chitt.  
 Rep. 9.

(3) Section 121.

**Effect.**

As to its  
operation  
on a debt  
contracted  
in the  
colonies.

*English, or Scotch.* (1) It is said, however, in some of the books, that a certificate under a commission in England will not bar a debt contracted in the West Indies (2), on the authority of an opinion given by Lord Talbot, when at the bar, to this purport: viz. that notwithstanding the effects of the bankrupt in the colonies are liable to a commission here, and the right is vested in the assignees — and though it might seem reasonable that his certificate should be equally extensive — yet, as the Bankrupt laws of England were made since the West Indian colonies were settled, and therefore did not extend to them unless they were expressly named, — he was of opinion, that a certificate, though confirmed here, would be no discharge to the bankrupt, if a suit was commenced against him in Barbadoes. But in a case, which was not long ago decided at the cockpit, upon an appeal from the colonial court of Demerara, it was determined (consistently as it seems with the above decision by the court of session in Scotland), that a certificate under an English commission, where the creditor had *full notice* of the commission, was a bar to a suit instituted in the colonial court for the recovery of a debt — the consideration for which debt was goods consigned by the plaintiff from Demerara to the defendant and his partner in London, for which the latter had accepted bills before their bankruptcy, having also engaged by letter to accept others, which were not presented till after the bankruptcy. (3) And, indeed, it seems but just, (as Lord Talbot admitted in his opinion above cited) that the effect of the *certificate* should be co-extensive with the *assignment*; for, if foreign courts allow the assignees under an English commission to strip the bankrupt of his foreign

(1) *Bank of Scotland v. Cuthbert*, 1 Rose, 486.; and see Cullen, 398. According to Mr. Bell, however, (Bell Com. 693. n.) the bills of exchange in this case being accepted by the drawees in England, the debt was considered as an *English* debt (and see post, 606). The point

decided, too, is said to be still *res judice*, though the decision took place so long ago as January 1815. Eden's B. L. 396.

(2) Beawes Lex. Mer. 4th ed. 543. Davis B. L. 459. C. B. L. 500.

(3) *Odwin v. Forbes*, Buck, 57.

property, by giving effect to the *assignment* in their jurisdiction, they ought with equal reason to give effect to the *certificate*, and not leave the bankrupt liable to the actions of the foreign creditors. (1)

*Effect.*

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With respect to the operation of a *foreign certificate* in this country, the English courts are guided by the question, *where the debt was contracted*, which the foreign certificate is set up to bar. If it was contracted in the *same country* where the discharge took place, the law of that country is held to prevail, and the debt therefore becomes extinguished (2); and this, as Lord Mansfield said, upon the general principle, that where there is a discharge of a debt by the law of one country, it will be a discharge in every other; and he added, that he remembered a case in Chancery of a *cessio bonorum* in Holland, which, being a discharge in that country, was held to have the same effect here. (3)

Operation  
of a foreign  
certificate.

It becomes, therefore, important to consider in the course of this inquiry, under what particular circumstances a debt will be held to be *contracted* in a particular country. In the case before Lord Mansfield, the demand arose upon a bill of exchange *drawn in Ireland*, and *payable* by the

In what  
country a  
debt held  
to be *con-  
tracted*.

(1) Mr. Eden thinks, that the only true ground upon which this case can be supported is, that by the Dutch law (according to which the Court professed to proceed) all foreign debts are barred by a Dutch discharge; and that, as the debt was in this instance a *colonial*, and *not an English* debt, the decision was, upon the *general* reasoning given in the judgment, quite untenable. But though the principle of reciprocity and mutual comity formed, certainly, one of the grounds for the judgment in that case, it is not so clear, that the debt was considered to be a *colonial* debt, according even to the principle of *Watson v. Renton*, (one of the cases cited by Mr. Eden from Bell's *Commentaries on the Laws of Scot-*

*land*, see post, 606.); for, though the consideration for the debt was the goods sent from Demerara, the *debt itself*, in virtue of the *acceptance* of the bills, might be said to have been *contracted* in England.

(2) *Burrows v. Jemino*, Str. 732. 2 Eq. Ab. 524. Mosley, 1. *Ballantine v. Golding*, C. B. L. 464. 499. *Potter v. Brown*, 5 East, 124.

(3) The *cessio bonorum* in Holland, however, seems (like the same proceeding among the Romans) to be a discharge of the *person* only, and not of the effects, except as to some few trifles of wearing apparel, &c. See Voet on the Pandects, 2 tom. lib. 42. tit. 3. and Lord Hardwicke's judgment in *ex parte Burton*, 1 Atk. 255.

Effect.

defendant, who resided in *Ireland*, and who had obtained a *certificate* under an *Irish commission*; this, therefore, was decidedly a foreign debt discharged by a foreign certificate. The general principle indeed (in the case of a debt arising on a bill of exchange) seems to be, that the country where the bill is *accepted and paid*, is the country where the debt is *contracted*. Thus, a bill of exchange, (though drawn by the defendant in *Ireland*) which was *accepted and paid* by the plaintiffs in *England*, was determined by the Court of King's Bench to be an *English* debt, and therefore not discharged by a certificate under an *Irish commission*. (1) And in like manner, the Scotch courts have holden, that bills accepted by the drawees in *England* constituted an *English* debt (2); and even that a bill drawn from *New York* upon *Greenock*, which was not accepted, was a Scotch debt, and consequently not discharged by the bankrupt's certificate in *New York*. (3) So, where goods were consigned by a merchant in *Scotland* to one in *England* — and a bill, payable at *Berwick*, was given for part of the goods — the *bill*, in this case, was held by the Scotch courts to be an *English* debt — while the general balance of the same debt, resting on the contract of sale, was considered as Scotch. (4)

Semble,  
that a  
foreign  
certificate  
is no dis-  
charge of  
an English  
debt.

The result deducible from all these cases, seems to be, that a *foreign certificate* is no bar to an action in *England* for an *English debt*; nor is an *English certificate* considered in *Scotland* a discharge of a debt wholly contracted there; for the courts of both countries appear to agree in their decision (at least with respect to bills of exchange) as to the circumstances, under which the debt is to be considered a *foreign*, or a *home-contracted*, debt. And the reasoning of Lord Kenyon, in giving judgment upon a point of this description, appears to be quite unanswerable; for it is impossible (as he observed) to hold, that a contract made in

(1) *Lewis v. Owen*, 4 B. & A. 654.

(2) *Bank of Scotland v. Cuthbert*,  
1 Rose, 462.; and see 2 Bell Com.  
693 a.

(3) *Armour v. Campbell*, cit. ibid.  
8 Fac. Coll. 417.

(4) *Watson v. Renton*, 2 Bell  
Com. 693.

one country is to be governed by the laws of another: and he puts the case (as that was) of a contract lawfully made by a subject in this country, which he resorts to an English court of justice to enforce — and the only answer given is, that a law has been made in a foreign country to discharge the defendants from their debts, on condition of their relinquishing all their property to their creditors. “ But (he adds) how is that an answer to a subject of this country suing on a lawful contract made here? How can it be pretended, that he is bound by a condition, to which he has given no assent either express (1), or implied?”

*Effect.*

A discharge, however, under a sequestration in Scotland issued against a trader residing there, in conformity to the provisions of the Scotch bankrupt act (the 54 G. 3. c. 137.) has been held to be a bar to an action against the trader here, on a debt contracted in England, in like manner as it is a bar to debts contracted in Scotland. (2) This decision, however, was expressly founded upon the effect of that particular statute, and not upon any general principle. (3)

Operation of discharge under the Scotch bankrupt act.

When a foreign certificate is set up in discharge of an action in this country, the courts think it a point of too much importance to be decided in a summary way (4); they will, therefore, refuse an application for an *exoneretur* to be entered on the bail-piece, on the ground of the defendant's discharge in the foreign country — and will direct an issue, in order to ascertain the circumstances under which the original debt was contracted. (5)

Effect of a foreign certificate not decided, upon a summary application.

Where an execution was levied against the goods of a bankrupt, for a debt which existed previous to the bankruptcy — and, previous to the execution of the writ, the

Certificate, before allowance, does

(1) *Smith v. Buchanan*, 1 East, 6.; and see *Quin v. Keefe*, 2 H. B. 553.

(4) *Pedder v. Macmaster*, 8 T. R. 610.

(2) *Sideaway v. Hay*, 3 B. & C. 12.

(5) *Bamfield v. Anderson*, 5 Moore, 331. *Quin v. Keefe*, 2 H. B. 553. 3 Moore, 244. *Whittingham v. De la Riese*, 2 Chit. Rep. 53. *Earlier v. Languishe*, *ibid.* 55.

(3) *Ibid.* 23.; and see *ex parte Geddes*, 1 G. & J. 414.

**Effect.**

not in-  
validate an  
execution  
levied.

bankrupt's certificate was signed by sufficient in number and value of the creditors, but it was not allowed by the Lord Chancellor until after the writ was executed;—the execution was held, under these circumstances, to be valid. (1) Mr. Cooke, however, adds a quære to this case, whether the goods could legally be considered as the bankrupt's, the property of an uncertificated bankrupt belonging to his assignees. But it seems to be now clearly settled, that although property acquired by an uncertificated bankrupt *may* be taken from him by his assignees, yet it does not *absolutely* vest in them; and if they make no claim to it, the bankrupt has a right to retain it against all other persons. (2)

Certificate  
discharges  
all debts,  
whether  
joint, or  
separate.

The certificate discharges the bankrupt from all debts, whether joint or separate—and whether the commission, under which it is obtained, is a joint or separate commission; for the debts, which a man owes *jointly* with another, are in law as much his own debts, as those which he owes on his *separate* account. (3)

A dis-  
charge of  
the consi-  
deration  
for an  
annuity.

Where an annuity was granted for a sum paid as a consideration, and the grantor became bankrupt—and afterwards the annuity was set aside,—the certificate was held a bar in an action against the grantor for money had and received—on the ground, that the annuity having been set aside, was to be considered as if it had never existed—and that the relation took place to the time when the money was paid, the plaintiff's title to the money accruing from that time. (4)

Operation  
of certifi-  
cate dis-  
charged  
where  
bankrupt  
has been

Where the bankrupt has been already discharged by a certificate under any former commission; or has previously *compounded* with his creditors, or been discharged by an insolvent act, it is declared by section 147. (5) of the new

(1) *Cullen v. Meyrick*, 1 T. R. 361. *Wicker v. Strahan*, 2 Str. 1157. *Howard v. Poole*, *ibid.* 995. *Grace v. Higham*, Fitz. 281.

(2) *Drayton v. Dale*, 2 B. & C. 293.; and see ante, 555.

(4) *Walker v. Liscarry*, 6 Esp.

(3) Ex parte *Yale*, 3 P. Wms. 25. note (A). *Horscy's case*, *ibid.* 23. *Twiss v. Massey*, 1 Atk. 67.

(5) And see 5 G. 2. c. 30. s. 9.

statute, that the certificate will only protect his *person* from arrest, unless his estate (after all charges) shall produce sufficient to pay every creditor under the commission 15s. in the pound; and his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children) will now vest in the assignees under the second commission, who will be entitled to seize the same, as they might have seized property of which he was possessed at the issuing of the commission.

*Effect.*

already  
discharged  
under a  
former  
commis-  
sion.

With respect to that part of the above clause which relates to a *previous bankruptcy*, it will be seen, that the provision (as to the liability of the bankrupt's future effects) is very different from the construction put, in most of the cases hitherto decided, upon the 5 G. 2. c. 30. s. 9.—by which construction *any creditor*, though he had even signed the certificate under the second commission, was (before the 49 G. 3. c. 121. s. 14.) enabled to bring an action against the bankrupt, and recover against his future effects. (1) The clause in the *new act* does not say that the future estate and effects shall be liable to the *creditors generally*, but declares expressly, that they shall *vest in the assignees* under the second commission, unless 15s. in the pound is paid; so that—independently of the construction of the 59th section of the new statute (which is taken from the 4th section of the 49 G. 3. c. 121.), by which the proving a debt under a commission is declared to be deemed an *election* by the creditor to take the benefit of the commission, with respect to the debt so proved (2)—no individual creditor, who has even not proved his debt, can now with any effect (as he could under the 5 G. 2.) sue the bankrupt after he has obtained his certificate; for his *person* is protected by his

Operation  
of the  
clauses  
as to a  
previous  
bank-  
ruptcy.

(1) *Philpott v. Corden*, 5 T. R. Ex parte *Baker*, 1 Rose, 452. Ex 287. *Gill v. Scrivens*, 7 T. R. 27. parte *Hodgkinson*, 2 Rose, 172. *Jelfs v. Ballard*, 1 Bos. 467. Ed- 19 Ves. 291. *monson v. Parker*, 3 Bos. & P. 185. (2) *Read v. Sowerby*, 3 M. & S. *Coverly v. Morley*, 16 East, 225. 78. *Hovill v. Browning*, 7 East, 159.

Effect.

certificate; and an execution would be of no avail against his *effects*, which are declared by the statute to be *vested* in the assignees. The only remedy, therefore, to render such future effects available is the power given to the assignees in the latter part of the above section, enabling them to seize the effects in the same manner, as they may seize his other property at the issuing of the commission. All the cases, however, as to this point, which have been decided upon questions between the bankrupt and the *creditors* generally, will still be applicable to future questions between the bankrupt and the *assignees* under the second commission. (1)

Of certificate under second commission, when the first has been superseded.

A certificate under a second commission, (although the first commission has been even *superseded* with the consent of the creditors) it has been held, will not protect a bankrupt's future effects, unless 15s. in the pound are paid under the second commission (2); for the question is, as Lord Mansfield put it, whether a *supersedeas* can make a thing not to have been done, which in fact has been done, namely, the bankrupt's discharge under the first commission; and even if the first bankruptcy was to be considered as never having existed, yet if the creditors have accepted a dividend under the first commission in lieu of their whole debt, they, at any rate, would then be taken to have *compounded* for their debts within the meaning of the statute. (3)

Cognovit given two years before second commission.

Where a defendant in an action gave the 'plaintiff' a *cognovit* for the amount of the damages — and two years afterwards a second commission of bankrupt issued against the defendant, under which he obtained his certificate, but

(1) It seems that a different construction from that laid down in *Hovil v. Browning*, and the subsequent cases, was formerly put upon the 9th section of the 5 G. 2. c. 30. (*Ashley v. Hill*, 2 Christ. 529. Davies, 515.) by which it was held, that the future estate of the bankrupt actually vested in the assignees under the second commission, if he

did not pay 15s. in the pound. And this construction, Mr. Eden thinks, ought to have prevailed in *Hovil v. Browning*, instead of holding, that any individual creditor might sue the bankrupt under the second commission. Eden, 394.

(2) *Thornton v. Dallas*, Doug. 46.

(3) 1 Doug. 48.



*no dividend had been declared*—and the plaintiff afterwards entered up judgment, and took out execution;—upon a motion to set it aside, on the ground of the *cognovit* being discharged by the subsequent bankruptcy and certificate, the Court refused the motion, saying, that a *cognovit* is a mere acknowledgment of the amount of the damages—and that where a man acknowledges the cause of action, the plaintiff may sign judgment at any time. (1)

*Effect.*

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As to the form of pleading, and the evidence necessary to defeat a certificate under a second commission, see *post*.

With respect to a certificate under a *third* commission, it has been held, that though the bankrupt had not paid 15s. in the pound under the second, the certificate was not void, but voidable only by application to the Lord Chancellor. (2) For a certificate is valid, as long as the commission under which it is obtained continues in force—unless, indeed, in those cases where the statute says that the certificate shall be absolutely void. (3)

As to certificate under *third* commission.

In that part of the above clause which relates to the *compounding* with creditors, such a composition only is contemplated, as is *general*, and is calculated to admit *all creditors of every description*. Therefore, where a deed of composition was framed only for the *joint* creditors of two bankrupts, and not signed or accepted by the *separate* creditors of one of the bankrupts, it was held not such a *compounding*, as would prevent the certificate from extending to the protection of the future *property* of the bankrupt, as well as of his person. (4) But, if the terms of the deed embrace *all* the creditors, although some of them do not come in, and afterwards sue the bankrupt, and are paid, — *that* has been held to be such a *compounding*, as will deprive the bankrupt of the benefit of his certificate, with regard to the protection of his future effects. (5) It is a

Operation of certificate after *compounding* with creditors.

(1) *Wyborne v. Ross*, 2 Taunt.

(4) *Norton v. Shakespear*, 15 East, 619.

(2) *Todd v. Maxfield*, 3 B. & C.

(5) *Slaughter v. Cheyne*, 1 M. & S. 182.

(3) *Ibid*.

*Effect.*

question, however, when a bankrupt (who has previously compounded with his creditors) pays those creditors before his bankruptcy the *full amount* of their debts, whether his future estate and effects are to remain liable, unless his estate under the commission shall produce 15s. in the pound. The above provision in the statute makes no distinction, whether the creditors, with whom the bankrupt has compounded, are afterwards satisfied or not. And it may be argued, that such a case is within the mischief contemplated by the act; for the bankrupt will have had all the benefit (for a certain time at least) of a composition, till he could satisfy his creditors the full amount of their debts; and, in the interim, the creditors will have sustained some damage by the delay. The crime, therefore, (if it may be so called) of non-payment will be complete at one time, and the subsequent payment in full may have been the very cause of his bankruptcy. (1) On the other hand it may be contended, that the term "compounding with his creditors" is intended by the statute to imply simply a composition as to the *amount* of his debts—that is, accepting a part in satisfaction of the whole; and that when the debts are actually paid *in full*, the agreement of the creditors to give the bankrupt merely *time* for payment, cannot be said to come within the meaning of the word *composition*.

As to discharge under insolvent act.

Where money fraudulently misapplied,

An uncertificated bankrupt is not entitled to his discharge under the insolvent act, unless he has been in custody for the space of three years. (2)

Where after the bankruptcy of one partner, the other was obliged to pay a partnership debt, which he had before the bankruptcy furnished the bankrupt partner with money for the express purpose of discharging—who, instead of doing so, misapplied the money,—this was considered to be such a case of *fraud*, as prevented the certificate from operating as a bar to an action by the solvent partner,

(1) See the argument of Mr. J. case of *Read v. Sowerby*, 3 M. & Holroyd (then at the bar) in the S. 79.

(2) 7 G. 4. c. 57.

for the bankrupt's proportion of the debt paid subsequent to the bankruptcy. (1) But, as such a debt *may* be proved now under the 52*d* section of the new act, it is a question, whether he would not be discharged by his certificate; for, notwithstanding the fraudulent misapplication of the money by the bankrupt, it does not seem to come within those exceptions enumerated in the act, which render the certificate void.

The certificate does not estop the bankrupt, from disputing the validity of the commission against a *stranger* to it, between whom and the bankrupt there is, consequently, no reciprocity. Therefore, in an action of trover brought against a stranger to the commission by a bankrupt, who had obtained his certificate under a joint commission issued against himself and others, he was held to be not prevented from taking advantage of its illegality. (2)

Certificate does not estop bankrupt from disputing commission against a stranger.

It has been before stated (3), that where the bankrupt is *assignee* of another bankrupt's estate, and is indebted to that estate in respect of money retained or employed by him to the amount of 100*l.*, the certificate will only have the effect of freeing his *person* from arrest; but his future *effects* will remain liable for so much of his debt to the estate of which he is assignee, as shall not be paid by dividends under his commission, together with interest for the whole debt. (4)

Operation of certificate where bankrupt assignee of another bankrupt estate.

The certificate, also, (as has been already mentioned (5)) will have no effect, unless it is entered of record at the Bankrupt office, and has a memorandum of such entry indorsed on it by the proper officer, pursuant to the directions of the 95*th* and 96*th* sections of the new act.

Of no effect, unless registered.

(1) *Wright v. Hunter*, 1 East, 20

(2) *Butts v. Bilke*, 4 Pri. 240.

(3) Ante, 341.

(4) Sections 104, 105.

(5) Ante, 576.

## SECTION VII.

*Of Pleading the Certificate, and herein of the Evidence to support it, or defeat it.*

When  
bank-  
ruptcy and  
certificate  
may be  
pleaded.

By *section 126. (1)*, any bankrupt who shall, after his certificate is allowed, be arrested, or have any action brought against him for any *debt, claim, or demand, made proveable by the statute under the commission (2)*, may be discharged upon common bail; and may plead in general, that the cause of action accrued before he became bankrupt, and give the act and the special matter in evidence; and such certificate and the allowance thereof will be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate, provided the certificate is registered pursuant to the directions contained in the 95th and 96th sections. (3)

The form  
given by  
the statute  
must be  
followed.

As the statute provides for the *particular form* of the plea, viz. that the cause of action accrued before the defendant became bankrupt,—he cannot, therefore, give his bankruptcy in evidence under the *general issue*. (4) Neither can he plead specially in an action of covenant, “that before the action he became bankrupt, and that the said indenture was made before he became bankrupt;” for he must comply strictly with the form of the plea prescribed by the statute. (5) But it is not necessary to aver, that the bankruptcy happened before the commencement of the suit. (6) And though the certificate is allowed *after* the

(1) Taken from 5 G. 2. c. 30. s. 7. 13.

(2) The words in italics are introduced instead of the words, “any debt due before such time as he became bankrupt,” which were in the 5 G. 2. c. 30. s. 7.

(3) The provisions contained in the 5 G. 2. c. 30. s. 7. that if a verdict passed for the defendant, he

was to recover full costs, seems to be unintentionally omitted. Eden, 399. note (a).

(4) *Gowland v. Warren*, 1 Camp. 363.

(5) *Charlton v. King*, 4 T. R. 156.

(6) *Tower v. Cameron*, 6 East, 413.

commencement of the action, yet if it is *before* the plea is pleaded, it will be evidence to support the general plea given by the statute. (1) *Of pleading it.*

It is said to have been ruled by Lord Kenyon, that a certificate granted *after* plea pleaded, though before trial, was not available at law. (2) But it seems to be settled, that it may be pleaded *puis darrein continuance* at any time before judgment; and an affidavit verifying the plea *to the best of the deponent's knowledge and belief*, has been held a sufficient affidavit to accompany the plea under the 4 Ann. c. 16. s. 11. (3) Thus, where an uncertificated bankrupt had pleaded a judgment recovered—and upon an issue of *nul tiel record*, the plaintiff ruled him to produce the record on the 25th April—and the bankrupt (who had obtained his certificate on the 14th of April) on the morning of the 25th moved for leave to plead the allowance of the certificate *puis darrein continuance*,—the Court in this case allowed the plea. (4) And though the certificate be not obtained till after judgment, when it is too late to plead it, it is still available for the bankrupt's discharge out of execution for the debt and costs. (5)

The plea of bankruptcy does not require the signature of counsel in the King's Bench (6); but in the Common Pleas a serjeant's signature is necessary to it. (7) The plea must be *delivered*, and not filed. (8) *As to counsel's signature.*

It was once held, that the defendant must aver in his plea, "that he has conformed according to the statutes *As to averment of conformity.*

(1) *Harris v. James*, 9 East, 82. Quære, Whether the wording of the new act, section 126. (in which the words, "after his certificate shall have been allowed," are used—instead of the general word "afterwards," in the 5 G. 3. c. 30. s. 7. 13.) will not make a difference in this respect.

(2) *Longmead v. Beard*, cit. 9 East, 85.

(3) *Sharpe v. Witham*, 1 McClell. & Y. 350.

(4) Ibid.

(5) Per Lord Ellenborough *Harris v. James*, 9 East, 92.; and see Section 126.

(6) *Leigh v. Monteiro*, 6 T. R. 496.

(7) *Pitcher v. Martin*, 3 Bos. & P. 171.

(8) *Henderson v. Samson*, 2 B. & A. 392.

*(of plead-  
ing it.)*

concerning bankrupts;” it: but this case was afterwards decided to be law; for, if the defendant has not confessed, it is matter of evidence <sup>2</sup>, and the statute having directed a general form of pleading the bankruptcy, it seems sufficient to follow the words of the statute.

*Pleading  
in equity.*

As to pleading the certificate in equity, it has been held, that if the demand of a plaintiff in equity against a bankrupt is in the nature of an action at law for a debt, the bill may be demurred to; but if it is in the nature of an action of *assumpsit*, the defendant may plead his bankruptcy and certificate. (3)

*As to  
pleading  
certificate  
when sued  
by surety.*

If a bankrupt is sued by his surety, or other person who was liable for his debts at the time the commission issued against him, (though the surety may have become such after the act of bankruptcy, and pays the debt after the issuing of the commission), the bankrupt must plead his bankruptcy and certificate, if he means to avail himself of it. (4) In such a case it has lately been decided (with reference to the 8th section of the 49 G. 3. c. 121.), that the general plea of bankruptcy was sufficient without pleading the bankruptcy (5) specially—the obvious meaning of that section being, in the words of Lord C. J. Abbott, that the bankrupt should have the same benefit of a precise form of pleading, as if the debt had arisen before the bankruptcy; and that a payment made by the *surety* after the bankruptcy placed the party in the same situation, as if the payment had been made *before* the bankruptcy by any *other* person. (6) This decision, however, was founded on the peculiar wording of the latter part of the 8th section of the 49 G. 3. (which is omitted in the parallel section, the 52d, of the new statute)—as well as upon the circumstance of no decision having been cited, to show that the general form would not do. But a case might have been cited, in which it was held by

(1) *Paris v. Salkeld*, 2 Wils. 139.

(2) *Willan v. Geordini*, 1 C.B.L. 12 East, 664. 13 East, 427. 518.

(3) *De Tastet v. Walker*, Buck, A. 12. 155.

(4) *Stedman v. Martimont*,

(5) *Westcott v. Hodges*, 5 B. &

(6) *Ibid.* 17.

Lord Mansfield, that when a promissory note was *made before*, but was not payable until *after* the bankruptcy, a plea that the debt was due at the time of the bankruptcy was bad in point of form. (1) It may therefore still be advisable, in such a case, to plead the bankruptcy more specially, than in the general form given by the statute. (2)

*Of plead-  
ing it.*

The general plea, as given by the statute, puts the whole merits of the question in evidence on both sides; and, therefore, in an action on a bond to which bankruptcy is pleaded, the plaintiff will be allowed to give the *consideration* of the bond in evidence, to show that he is not barred by the certificate. (3) So, the plaintiff will be at liberty to give evidence of gaming by the bankrupt, in order to vitiate the certificate; but he must confine his evidence to *one day*, if he relies upon the bankrupt having lost 20*l.*; and he must also elect, whether he will give evidence of one loss amounting to 20*l.* in one day, or of several losses in the year amounting to 200*l.* (4) And, generally, all facts, which the plaintiff relies on as vacating the certificate, may be given in evidence on the *similiter* to the defendant's plea (5); for (the plea of bankruptcy and certificate *concluding to the country*) a replication of any new fact (which according to the rules of pleading must *conclude with a verification*) would be bad on special demurrer. (6)

*General  
plea puts  
the whole  
merits in  
issue.*

Where the defendant, upon a plea of bankruptcy, put in a certificate under a commission issued against him by a different name from that which he was commonly known by, — upon its being objected that the certificate was a nullity, Lord Ellenborough ruled, that the objection might be a good ground for applying to the Lord Chancellor to supersede the commission — but that if it really did issue against *the defendant*, while it remained in force, he must give

*When  
commis-  
sion issued  
against  
bankrupt  
by a differ-  
ent name.*

(1) *Trueman v. Fenton*, Cowp. 544.

(2) See *Wood v. Dodgson*, 2 M. & S. 196.

(3) *Alsop v. Price*, Doug. 155.; and see *ex parte Kennet*, 1 Ves: & B. 193, 1 Rose, 331.

(4) *Hughes v. Morley*, 1 Holt, 520.

(5) S. C. 1 B. & A. 22.

(6) *Wilson v. Kemp*, 2 M. & S. 549.; and see *Miles v. Williams*, 1 P. Wins. 258.

*Of pleading it.*

effect to the certificate; but he required evidence, that the defendant was once called by the name mentioned in the commission. (1)

*Foreign certificate should be specially pleaded.*

A certificate obtained in a *foreign* country should be *specially* pleaded, setting forth all the proceedings under the bankruptcy; for where, under a bankruptcy in *Ireland*, there was a general plea of the bankruptcy and certificate, referring to the *Irish* statute, and concluding to the *country* in the same manner as the plea allowed with respect to *English* bankrupts, it was held bad. (2)

*What certificate affords presumptive proof of.*

On the trial of a plea of bankruptcy, the time of the issuing of the commission is presumptively proved to be on the day of the date of the commission, as it appears in the certificate—and the time of the act of bankruptcy, upon which the commission issued, is also presumptively proved by the statement of it in the proceedings under the commission. (3)

*Plaintiff can only impeach the certificate.*

It was held by Lord Kenyon, that the plaintiff was precluded from going into any evidence to impeach the *commission*, and that it must be confined to the *certificate* only; but that, if the petitioning creditor signed the certificate, evidence might then be admitted of his debt being of such a description, as would render the certificate null and void, though it might have the effect of impeaching the commission itself. (4)

*As to costs, when bankrupt sued by executor.*

In an action brought against a bankrupt by an executor, though the defendant obtains a verdict upon a plea of bankruptcy and certificate, the plaintiff is in this case no more liable to costs, than when suing as executor in any other action; for the general statutes giving costs to defendants are held not to extend to executors and administrators. (5).

*Where certificate pleaded*

When a bankrupt pleads his certificate under a *second commission*,—the production of the *first* commission and the

(1) *Stevens v. Elizée*, 3 Camp: 256.

(2) *Quin v. Keefe*, 2 H. B. 553. For a form of a plea of a foreign certificate, see *Potter v. Brown*, 5 East, 124.

(3) *Pearson v. Fletcher*, 5 Esp. 90.

(4) *Bateson v. Hartink*, 4 Esp. 43.

(5) *Martin v. Norfolk*, 1 H. B. 528.



proceedings under it, with proof that the bankrupt submitted to it, is sufficient evidence against him, of his having been a bankrupt under the first commission. (1) And the *onus* then lies on the bankrupt to prove, that his estate has *actually* paid 15s. in the pound under the second commission (2); for mere proof of the probability of this is not sufficient. (3) When indeed, under the former law, a judgment creditor had recourse to a *scire facias* against a certificated bankrupt under a second commission, in order to obtain execution against his effects, the plaintiff was obliged to aver, that the bankrupt's estate had not paid 15s. in the pound—because, in a *scire facias*, the plaintiff must state every thing that entitles him to recover (4)—though it seems that the plaintiff was not bound to prove that negative. (5)

Where, on the defendant's pleading his bankruptcy, issue is joined on the fact, whether he has been discharged or not under a *former* commission, — the plaintiff must show, that the defendant obtained his certificate under that commission, either by the regular proof of it, or by secondary evidence after notice to produce it. The defendant's affidavit of conformity under the first commission would be good *secondary* evidence, if (after notice) he failed to produce the certificate; but it would be insufficient without such notice. (6) If, however, after notice to produce the former certificate, the defendant does not produce it, — it is sufficient evidence of the allowance of it by the Lord Chancellor, if witnesses state, that they were employed by the bankrupt to solicit the certificate—and that, looking at their books, they have no doubt it was allowed (7) by the Lord Chancellor. But the book kept in the office of the secretary of

*Of pleading it.*

under a second commission, what bankrupt bound to prove.

What plaintiff bound to prove to defeat it.

As to secondary evidence of former certificate.

(1) *Haviland v. Cook*, 5 T. R. 655.

(4) *Gill v. Scrivens*, 7 T. R. 27.

(2) *Jelfs v. Ballard*, 1 Bos. & P. 467. *Edmonson v. Packer*, 3 Bos. & P. 187. *Gregory v. Merton*, 3 Esp. 195.

(5) Per Lord Alvanley, 3 Bos. & P. 187.

(6) *Graham v. Grill*, 4 Camp. 282.

(7) *Henry v. Leigh*, 3 Camp. 499.

(3) *Coverly v. Morley*, 16 East, 225.

Of pleading it.

bankrupts, in which entries are made of the allowance of the certificate, is not secondary evidence of the allowance, in the absence of the clerk who made the entry. (1)

Where bankrupt neglects to plead his certificate;

Where judgment was obtained against a defendant, who had omitted to plead his bankruptcy through the neglect of his attorney—and it was a fair case on the part of the defendant,—the Court of Common Pleas set aside the judgment, in order to let in the plea of bankruptcy, observing, that it would be cruel to charge the bankrupt from such neglect. (2) But where a bankrupt, after pleading his bankruptcy, neglected to produce his certificate upon the trial, and a verdict was obtained against him,—the Court of Chancery would not assist him by granting him an injunction. (3)

or to produce it upon the trial.

Consequences as to bail.

In a case, where the defendant's *bail* became fixed, in consequence of his omitting to plead his bankruptcy, the Court of Common Pleas refused to set aside the proceedings against them, saying, that it was the duty of the bail to watch the proceedings against their principal; and that they were in all cases bound, or benefited, by the defence which he makes (4) to the action. But this case has never been acted upon in the Court of King's Bench, where the general rule is, that wherever the bankrupt is entitled to his discharge, the Court will relieve the bail, on motion for entering an *exoneretur* on the bail-piece. (5) Where the proceedings in an action on the bail-bond were stayed, and the defendant in the original action afterwards pleaded the general issue, and subsequently a plea of bankruptcy *puis darrein continuance*—there being no affidavit that the application to stay the proceedings was made on the part of the bail,—the Court of King's Bench set aside the latter plea, and restrained the defendant to his plea of

(1) *Henry v. Leigh*, 3 Camp. 499.

(2) *Evans v. Gill*, 1 Bos. & P. 52.

(3) *Lingard v. Hibbertson*, 1 Rose, 460.

(4) *Clarke v. Hoppe*, 3 Taunt. 46.

(5) *Todd v. Maxfield*, 3 B. & C. 222.

the general issue—on the ground, that when the proceedings were stayed in the action on the bail-bond, it was intended, that the defendant should only question the validity of the original debt. (1) The plea of bankruptcy also is given only to the bankrupt himself: bail, therefore, cannot plead the bankruptcy and certificate of their principal in an action brought against them; but must either apply to the Court for summary relief by motion, or proceed by *audita querelâ*. (2)

*Of pleading it.*

On the production of the certificate in evidence, the indorsement thereon, purporting to be signed by the proper officer at the bankrupt office, will (without any proof of such signature (3)) be admissible evidence of the certificate having been duly entered of record, pursuant to the requisitions of the 95th and 96th sections of the new statute.

*Registry of certificate, how proved.*

The allowance of the certificate needs no proof; for the Judges take judicial notice of the hand-writing of the Lord Chancellor.

*Allowance.*

## SECTION VIII.

### *Of Discharging a certificated Bankrupt.*

By section 126. of the new statute (as we have already seen) it is provided, that where the bankrupt after the allowance of his certificate is arrested for any debt, claim, or demand, proveable under the commission, he may be discharged upon common bail. And if he is taken in execution, or detained in prison for such debt, where judgment has been obtained before the allowance of his certificate, any Judge of the court wherein the judgment has been obtained may, on the bankrupt producing his certi-

*Bankrupt may be discharged on common bail.*

(1) *Dowson v. Levi*, 4 B. & A. 450. *Donnelly v. Dunn*, 1 Bos. & P. 45.

(2) *Walker v. Giblett*, 2 Bl. 812. (3) Section 96.; and see post. *Beddome v. Holbrooke*, 1 Bos. & P. Chap. XVIII. title "Evidence,"

*Of discharging the bankrupt.*

Officer cannot discharge without a Judge's order.

When order for discharge will be refused.

A feigned issue sometimes directed.

As to relief on an *audita querela*.

ificate, order the officer to discharge him without exacting any fee.

The officer, however, who arrests the bankrupt, has no power to discharge him without the order of a Judge; and therefore, where a bankrupt taken in execution produced his certificate to the officer and demanded his discharge, with which the officer complied, the Court refused to stay proceedings in an action against the sheriff for an escape. (1)

The Court will not discharge the bankrupt upon common bail, if it appears that the certificate was obtained by fraud (2)—or that the bankrupt has been guilty of any deception (3)—or if the certificate is seriously meant to be disputed. (4) But in a case where an attorney, who had obtained his certificate under a commission, describing him as “a dealer and chapman,” was arrested for a debt payable before the commission issued—though the plaintiff swore that he did not know that the defendant was the person mentioned in the commission, and that he intended to dispute the validity of it on the ground of fraud,—the Court of Common Pleas nevertheless ordered the bankrupt to be discharged on common bail, as the plaintiff had not stated the *nature* of the fraud, nor *when* he discovered its existence. (5) The Courts, however, will sometimes, when they think it necessary, instead of discharging the bankrupt in a summary way, direct the commission to be tried on a feigned issue (6); and the same thing also has been done against the bail, where the validity of the certificate has been contested. (7)

In cases where execution had been taken out against the goods of a bankrupt, and executed after the allowance

(1) *Sherwood v. Benson*, 4 Taunt. 631.

(2) *Vincent v. Brady*, 2 H. B. 1.

(3) *Sowley v. Jones*, 2 Bl. 725.

(4) *Stacey v. Frederici*, 2 Bos. & P. 390. *Nowers v. Colman*, Buck, 5.

(5) *Kemp v. Neville*, 5 Moore, 21.

(6) *Yeo v. Allen*, Tidd. Prac. 215.

(7) *Wooler v. Leicester*, 6 Taunt. 75.

of the certificate, it was formerly held, that a Judge had no authority to discharge the execution upon motion, and that the bankrupt, to obtain relief, must resort to an *audita querelâ*. (1) But the modern practice appears to be, for the Courts to interpose in a summary way in all cases, where the party would be entitled to relief on an *audita querelâ*. (2)

Of dis-  
charging  
the bank-  
rupt.

A certificated bankrupt is, also, entitled to be discharged from custody, though his imprisonment is in the nature of a contempt, in not obeying the order of the Lord Chancellor made in a previous matter of bankruptcy—that is, if such order is for the *payment of money* by him, which could be proved under his commission. (3)

As to  
imprison-  
ment for a  
contempt

It has been suggested, that bankruptcy and certificate is no ground of discharge of a prisoner in custody on a *capias utlagatum* (4); though it is somewhat difficult to extract such a position from the very confused report of the case, which is cited as an authority for it.

on a *capias*  
*utlagatum*.

As to the discharge of a bankrupt, when he is arrested upon a new promise to pay a debt barred by the certificate, see the following section.

Where a joint action is brought against a bankrupt (who has obtained his certificate) along with other defendants, the bankrupt's name will be struck out of the proceedings, unless he is indemnified by the plaintiff. (5)

Where  
bankrupt  
jointly  
sued with  
others.

(1) *Calcraft v. Swan*, Barnes, 204. *Ashdown v. Fisher*, *ibid.* 206.

*Callen v. Meyrick*, 1 T. R. 361.

(2) *Lister v. Mundell*, 1 Bos. & P. 427. 3 Bl. Com. 406.; and see *Anon.* 1 Salk. 93. and *Wicket v. Cremer*, 1 Ld. R. 439. 1 Salk. 264.

(3) *Ex parte Eicke*, 1 G. & J. 261.

(4) *Beauchamp v. Tomkins*, 3 Taunt. 141.

(5) *Ex parte Read*, 1 Rose, 460. 1 V. & B. 346.

## SECTION IX.

*Of the Bankrupt's Liability on a new Promise.*

The promise must now be in writing, and signed by the bankrupt.

A plaintiff need only declare on the original consideration.

Security given by bankrupt after his bankruptcy for part of a debt not proved, valid.

Though a bankrupt is discharged by his certificate from all debts due at the time of the commission, he may still make himself liable on a *new promise* to pay any one of those debts; for, though all *legal* remedy of the creditor is taken away by the statute, the debt itself is clearly not extinguished in *conscience*; and every honest man, as Lord Mansfield observed, would discharge all debts owing by him at his bankruptcy, if he afterwards had it in his power to do so. (1) But it is now provided by the new statute (*section 131.*) that such promise must be *in writing*, in order to bind the bankrupt; and it must also be either signed by himself, or by some person lawfully authorised in writing by him.

The existence of the debt *in foro conscientiae* is a sufficient consideration for the bankrupt's promise to pay it; and *indebitatus assumpsit* will lie against him on the original consideration, to which the certificate will be no bar (2); neither need the plaintiff declare specially on such new promise; but it will be sufficient for him to declare generally, and give the subsequent promise in evidence. (3)

The bankrupt, also, may after his bankruptcy give a creditor (who does not come in under the commission) a valid security for the whole, or for part of his debt, which will not be barred by his certificate. As where a bankrupt, who was indebted to the plaintiff upon two notes for 63*l.* 9*s.* each (which were not proved under the commission), voluntarily proposed to secure to him the payment of 67*l.* in satisfaction of his debt, if he would take up the two notes, and cancel and

(1) Per *Ld. M.* 2 *Cowp.* 548. 205. *Williams v. Dyde, Peake*, 65.  
Per *Ld. Hard.* 1 *Atk.* 256. *Dillon v. Bailey*, cit. *Cowp.* 549.

(2) *Penn v. Bennett*, 4 *Camp.* (3) *Ibid.*

deliver them to the bankrupt — and the plaintiff accordingly did so, and took in exchange from the bankrupt a fresh note for £100; — it was, held, under these circumstances, that a plea of bankruptcy and certificate would not bar the plaintiff's demand on the last-mentioned note — and that, as there was no scheme on the part of the plaintiff to deceive or impose upon the bankrupt, the plaintiff might recover. (1) So, if a bankrupt after being discharged by his certificate applies to one of his creditors (who had proved under the commission) to lend him a sum of money to carry on his trade, or to become his security for any office — and as a consideration executes a bond for the old debt, — such bond is valid. (2) So, also, if a bankrupt pay interest upon a bond proveable under the commission, after having obtained his certificate, — it will be an admission by him that the principal was then due, and he will be liable as on a new contract. (3)

Liability on a new promise.

So for a debt proved, if after certificate.

As to payment of interest on a bond that was proveable.

Promise good, though made before certificate.

A promise also, made after bankruptcy to pay an old debt) is equally binding on the bankrupt, though it is made before he obtains his certificate; and such promise is not destroyed by the certificate being obtained afterwards. (4) Where a bankrupt after his bankruptcy, and before certificate, indorsed to the plaintiff two promissory notes, to secure a debt due before the bankruptcy, the certificate subsequently obtained was held no bar to an action on the notes. (5) Where, also, a defendant was in execution at the suit of the plaintiff, and a commission of bankrupt issued against him — soon after which, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confess judgment for the old debt — and the defendant afterwards obtained his certificate under the commission, — the certificate was held to be no bar to the plaintiff's recovering; for the bond and warrant of attorney being

(1) *Trueman v. Fenton*, 2 Cowp. 544. (4) *Roberts v. Morgan*, 2 Esp. 766.  
(2) *Ex parte Burton*, 1 Atk. 256. (5) *Brix v. Braham*, 1 Bing. 281.  
(3) *Alsop v. Brown*, Doug. 192.

*Liability  
on a new  
promise.*  
———

given to procure the defendant's liberty, the old debt became thereby extinguished, and it was considered to be a new debt (1) arising upon a new consideration. But any transaction of this nature will of course be invalid, if the object is to obtain a creditor's signature to the certificate (2), or to dissuade him from opposing the allowance of it by the Lord Chancellor.

*As to a  
conditional,  
or an ab-  
solute, pro-  
mise.*

In a case where a bankrupt, after obtaining his certificate, said, "*the plaintiff should be no loser, but that he would pay when he was able,*" — two of the Judges held, that this was a *conditional* promise, and that the plaintiff ought to have shown that the defendant *was able* to pay: but Lord Loughborough thought it amounted to an *absolute* promise. (3) General declarations, however, by the bankrupt, "*that he would pay every body, and that his effects would pay 20s. in the pound* (4)," are not sufficiently precise and positive to bind the bankrupt by a new promise, which should be in itself express, distinct (5), and unequivocal. And a subsequent promise to pay a promissory note, which had been given to a creditor by way of fraudulent preference, is a promise without consideration, and will not therefore support an (6) action.

*General  
declar-  
ations not  
sufficient.*

*As to lia-  
bility to  
arrest on  
subsequent  
promise.*

Where a certificated bankrupt was *arrested* for an old debt contended to have been revived by a new promise, namely, to "*pay when he was able,*" — the Court of King's Bench discharged him upon common bail; Lord Mansfield observing, that to keep a man in prison upon a *conscientious* obligation, would be taking advantage of his *conscientiousness* to use it against all conscience. (7) And in a recent case, the Court has acted upon the same principle, where the bankrupt was alleged to have made even an

(1) *Birch v. Sharland*, 1 T. R. 715.

(2) See ante, 567. 569. 570.

(3) *Besford v. Saunders*, 2 H. B. 116.

(4) *Lynbny v Weightman*, 5 Esp. 198.

(5) *Fleming v. Hayne*, 1 Star. 370.

(6) *Cookshott v. Bennett*, 2 T. R. 763.

(7) *Bailey v. Dillon*, 2 Burr. 736; *Ford v. Chillon*, 2 Bl. 799.



*absolute* promise to pay the debt, the Chief Justice saying, "that it was a question for the *jury*, whether, or no, the bankrupt has made himself liable by a new promise; and, "until they have decided that question against him, he is entitled to be discharged." (1) The like principle, also, has been adopted by the Court, where an insolvent debtor has made an *absolute* promise to pay a debt contracted prior to his discharge under the insolvent act. (2) The Court of Exchequer however have determined, that, when the promise of the bankrupt to pay is *absolute*, the bankrupt may be arrested (3) — on the principle, as it seems, that where the debt is *completely revived* by a subsequent promise to pay it, all its legal incidents are also revived; one of which is, the right of the creditor to hold his debtor to bail. This judgment is professed to be founded on the authority of two old cases in the King's Bench, in one (4) of which the point appears to be so decided: — but in the other, (5) the Court merely refused to set aside an *execution* against the *goods* of a defendant, who, having been discharged under the insolvent act, gave a note for a part of the debt not paid under the assignment. Moreover, the reasons assigned by the Court of Exchequer for its judgment, it must be confessed, do not appear to be very tenable; — for the debt cannot be said to be "*completely revived*," until a *jury* have found it to be so; and the mere *allegation of the plaintiff in his affidavit* to hold to bail can never be contended to amount to any evidence of such absolute revival.

*Liability  
on a new  
promise.*

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Where a bankrupt promised a creditor to pay him a sum certain, in consideration that he would not come under the

What act  
of the cre-  
ditor will

(1) *Peers v. Gadderer*, 1 B. & C. 116. The words of the 126th section are also extremely strong, viz. "any bankrupt, who, after his certificate shall have been allowed, shall be arrested for any debt made proveable under the commission, shall be discharged upon common bail."

(2) *Wilson v. Kemp*, 3 M. & S.

595. *Turner v. Schomberg*, 2 Str. 1233. sed vide contra, *Horton v. Moggridge*, 6 Taunt. 563.

(3) *Blackbourn v. Ogle*, 8 Pri. 526.

(4) *Drew v. Jefferies*, Hil. T. 1786. 8 Pri. 531. 1 Tidd. Prac. 231.

(5) *Best v. Barker*, Mich. T. 1782. 8 Pri. 533.

*Liability  
on a new  
promise.*

—  
be a wai-  
ver of the  
agree-  
ment.

commission — and the creditor afterwards petitioned the Lord Chancellor against the allowance of the bankrupt's certificate — this was held to be a waiver of the agreement — and that the creditor was thereby deprived of all claim to any benefit which he might have otherwise derived under it; for, by opposing the bankrupt's certificate, the creditor had been guilty of *mala fides*, in defeating the object of the agreement by an act which was totally inconsistent with it. (1)

(1) *Colls v. Lovell*, 1 Esp. 282.

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## CHAP. XV.

## OF PARTNERS.

SECT. 1. *Of the Effect of Bankruptcy generally, as to the Relation between Partners; and herein more particularly of the Effect of a SEPARATE Commission against one, or more, of the Partners.*

2. *What is JOINT, and what SEPARATE, Property under a joint or separate Commission.*

3. *What is a JOINT, and what a SEPARATE, DEBT.*

4. *Of Proof by JOINT CREDITORS against the joint and separate Estates.*

5. *Of Proof by SEPARATE CREDITORS under a Joint Commission.*

6. *Of Proof by Creditors holding Joint and several Securities; and herein of the Creditor's ELECTION against the joint, or separate, Estates.*

7. *Of Proof between Partners, and different Firms composing one general Partnership.*

As to the effect of a secret Partnership, see ante,  
*"Reputed Ownership,"* 418.

And as to the right of one Partner to his *Allowance* under a *Joint Commission*, see ante, Chapter XIII. "*Of the Bankrupt's Allowance.*"

HAVING in a former Chapter (1) considered the mode and effect of suing out both a *Joint Commission* against partners, and a *separate Commission* against one or more

(1) Ante, Ch. V. s. 4.

members of a partnership, it is proposed in this Chapter to inquire in what manner a joint, or separate, commission affects the *joint and separate property* of the partners;—and, afterwards, to consider the right of *proof* by the *joint and separate creditors* of the partnership, as well as that between the separate estates of the partners themselves; this being a branch of the subject, which it was thought too complex in the present treatise to include under the *general* title of *proof of debts*. The division of the subject matter intended to be discussed may, it is conceived, be conveniently arranged under the foregoing heads.

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### SECTION I.

*Of the Effect of Bankruptcy generally, as to the Relation between Partners; and herein more particularly of the Effect of a SEPARATE Commission against one, or more, of the Partners.*

Effect of  
joint com-  
mission.

Effect of a  
separate  
commis-  
sion as to  
bankrupt  
partner.

A *joint commission* against partners, followed by an assignment of the estate and effects, puts an end of necessity to the entire partnership; as all the joint stock and effects, with which the trade could be carried on, become thenceforth vested in the assignees. And, in the same manner, a *separate commission* against *one partner*, followed by an adjudication that he is a bankrupt, determines the partnership also, as to *him*, and avoids all *his* acts (1) from the day of the bankruptcy. It amounts in fact to a severance of the joint-tenancy subsisting between him and the other partners (2); and his assignees become thenceforth tenants in common with the solvent partner in all the partnership effects. But they cannot sue for any debts or

(1) *Thomason v. Frere*, 10 East, 418. *Hague v. Rolleston*, 4 Burr. 2174. (2) *Barker v. Goodair*, 11 Ves. 78. *Ex parte Smith*, 5 Ves. 295.

effects of the partnership, without joining the solvent partner as a plaintiff in the action (1), or his personal representatives (2) in the event of his death; for the assignees of the bankrupt partner take the partnership property, subject of course to all the rights of the solvent partner. (3) A *separate* commission, indeed, against one partner so completely dissolves the partnership, that in a case, where a solvent partner after the act of bankruptcy of his co-partner indorsed a bill in the name of the firm, Lord Ellenborough held, that an action could not be maintained by the indorsee against the *two partners* as indorsers; for that at the time of the indorsement the bankrupt partner had no longer any interest in the bill, and was incapable of exercising any act of ownership over it, the partnership having then ceased to exist. (4)

*Effect of  
bank-  
ruptcy.*

---

With respect to the *validity* of acts done by the *solvent* partner, in the disposal of the partnership property after the act of bankruptcy of his co-partner, there seems to be some difference between the decisions *at law*, and those *in equity and bankruptcy*. *At law*, it has been holden that such a transfer of the partnership property, for a valuable consideration and without fraud, is valid against the assignees — on the ground that the purchaser, or person to whom the property is transferred, thereby becomes a tenant in common with the assignees of the chattel or property so transferred — and that, as one tenant in common cannot sue another, so neither can the assignees in this case bring an action of trover to recover the property back. (5) In the absence of fraud, indeed, it seems that by such a delivery the *whole legal* property is transferred (6); though Lord Kenyon is reported to have ruled

*Effect of  
separate  
commis-  
sion as to  
solvent  
partner.  
Decisions  
at law.*

(1) *Eckhardt v. Wilson*, 8 T. R. 140.

(2) *Fox v. Hanbury*, Cowp. 448.

(3) *Ibid.*

(4) *Ramsbottom v. Lewis*, 1 Camp. 279. *S. P. Thomason v. Frere*, *supra*; and see *Abel v. Sutton*, 3 Esp. 108. 1 Camp. 281. note (b).

(5) *Fox v. Hanbury*, *supra*. *Smith v. Stokes*, 1 East, 363. *Smith v. Oriell*, *ibid.* 368.; and see *Ramsbottom v. Cator*, 1 Star. 228.

(6) Per Lord K., 1 East, 369. Per Bayley J. 5 M. & S. 342.

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ruptcy.*

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once at *Nisi Prius*, that it was only good for a *moiety*. (1) It has, also, been more recently decided, that the circumstance of the solvent partner *having notice of the act of bankruptcy* makes no difference in the case; for where a solvent partner, knowing of the act of bankruptcy of his co-partner, procured a debtor to the partnership to give his bill in part satisfaction of the debt, and then indorsed it to a creditor in payment of the residue of his demand on the partnership, — such a transaction was held good against the assignees of the bankrupt partner. (2) In this case, certain principles were laid down by the Judges, which seem to throw great light on this subject, that was previously involved in no small degree of obscurity. It was observed by Lord Ellenborough, that though for future purposes the act of bankruptcy operates as a dissolution, so as to prevent the solvent partner from dealing with the partnership property to the same extent as if the partnership continued, yet that he has clearly a *lien* on the joint funds in his hands, in respect of all claims which were *consummate* at the time of the bankruptcy: — and that, where the solvent partner applies part of those funds in satisfaction of such a claim, the assignees cannot bring an action against the person to whom such funds have been so transferred; at any rate, not until the partnership account is taken, and it is ascertained whether the assignees are entitled to recover a balance against the solvent partner. For to entertain such an action, his Lordship added, would be pregnant with all the inconveniences, that would attend an action upon an unliquidated account between partners. Mr. J. Bayley, too, in his judgment very forcibly points out the many difficulties that would ensue, if the power of the solvent partner to dispose of the partnership effects (in payment of a partnership debt) ceased by the bankruptcy of the other partner; and the present Lord

(1) *Whitwell v. Thompson*, 1 Esp. 72.

(2) *Harvey v. Crickett*, 5 M. & S. 356.

C. J. Abbott (who took a part in this decision) said, that if a solvent partner is not thus at liberty to apply the partnership funds, he might be ruined in the midst of abundance of property capable of paying all the debts; and the creditors, also, would be compelled to wait until such time as assignees are chosen, and it is their pleasure to make distribution. *Effect of  
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ruptcy.*

It is difficult, however, to reconcile the following judgments of Lord Eldon with this doctrine of the Court of King's Bench; and, more especially, what he is reported to have said in one case (1), namely, that *all transactions affecting the joint property are overreached* by the prior act of bankruptcy of one of the partners. In the first of these cases, where a bill was filed by the assignees of a bankrupt partner for an injunction against a joint creditor, who had *after* the act of bankruptcy, though *before* the commission, attached the partnership goods in the Lord Mayor's Court, Lord Eldon granted the injunction — upon the principle, that a separate commission severs the joint-tenancy, and vests the bankrupt partner's share of the joint property in the assignees, by relation from the act of bankruptcy. (2) And the same order was made in another case of a similar description, where the joint creditor had even obtained judgment in the attachment (3) — his Lordship expressing his opinion, that if, after an execution against one partner, a commission of bankruptcy issues against him upon an act of bankruptcy antecedent to the execution executed, whatever may have been taken under the execution becomes by relation the property of his assignees, to be applied among all the joint creditors exactly as the application is made in bankruptcy. And he afterwards acted upon this opinion in a subsequent case, where joint effects had been taken in execution after an act of bankruptcy committed by one of the partners — in which he held, that

(1) *Barker v. Goodair*, 11 Ves. 78.

(2) *Ibid.*

(3) *Dutton v. Morrison*, 17 Ves. 193. 1 Rose, 213.

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ruptcy.*

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the assignees were entitled to the property so seized (1); for that, the partnership being put an end to the moment an act of bankruptcy was committed by one of the partners, a creditor could only take the interest of that partner subject to the partnership dealings. (2)

With respect to these very opposite judgments in Bankruptcy and at Law, there is certainly one difference in the facts upon which they are founded; but it does not seem to be very material for the purpose of the argument. In the cases decided at law, the creditor got possession of the property *with the consent* of the solvent partner; in those decided in equity, possession was obtained *without his consent*, but still by due process of law, in satisfaction of a just debt.

Where  
joint pro-  
perty at-  
tached in  
the West  
Indies, and  
separate  
commis-  
sion in  
England.

There is one case, however, which has been decided in a court of equity, not quite so much at variance with the decisions at law, and in which Sir W. Grant determined, that where a joint creditor of a partnership (principally carried on in the West Indies) had attached joint property there, the assignees of one of the partners (who became bankrupt in England) were entitled only to the *surplus* of the property in the hands of the creditor after satisfaction of his joint debt; and this, upon the ground, that the West Indian *solvent partners could not be controlled* in the management of their trade, or restrained by any proceeding here, from paying and applying the partnership assets as they thought fit. (3)

Where a  
partner  
interested  
in the pro-  
fits, but  
not in the  
property.

A partner, it has been held, may have no interest in the *property* of the partnership, though he may be interested in the *profits* of the concern — Sir J. Mansfield saying, that there was a clear distinction between being partners in goods, and being jointly interested in adventure. (4) A transfer of the *property*, therefore, by such a partner (after

(1) In re *Wait*, 1 Jac. & W. 605.

(2) But see *Heydon v. Heydon*, Salk. 592. contra.

(3) *Brickwood v. Miller*, 3 Meriv.

279.

(4) Per Mansfield C.J. and Gibbs J. 5 Taunt. 79, 80.



the bankruptcy of the partner solely interested in such property) is, of course, void as against the assignees. (1) But, under a commission of bankruptcy, the property in such a case is, nevertheless, administered (as to the joint creditors) as belonging to *all* the partners. (2)

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bank-  
ruptcy.*

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If one partner embezzles part of the partnership effects and becomes a bankrupt, his assignees can be in no better situation than the bankrupt himself, taking only such undivided share or interest as the bankrupt himself had, and subject to all the rights and liens of the other partner; they are, therefore, entitled only to the share of the balance remaining after the partnership debts are paid, and after the deduction of the amount of the (3) embezzlement.

Where the bankrupt partner has embezzled part of the joint property.

The assignees of the bankrupt partner take by the assignment all the *interest*, which the bankrupt himself was entitled to at the *time he became a bankrupt*. Therefore, where the bankrupt partner had advanced part of his share of the expense of an adventure, and gave his notes for the remainder, which did not become due until after the issuing of the commission — it was held, that the solvent partners could not (by discharging the notes) stand in his place, but that the assignees were entitled to his full share in the profits of the adventure — although the note creditors received only a dividend under the commission, and it was uncertain (at the time of the bankruptcy) whether the adventure would be attended with profit or loss. (4)

Assignees of the bankrupt partner entitled to all his interest, however uncertain, in a joint adventure.

Where the solvent partners continued to carry on the partnership trade with the capital, as constituted at the time of the bankruptcy, — the assignees of the bankrupt partner were held entitled (beyond an account and distribution of the stock, &c.) to a participation of subsequent profits made

Where the solvent partners continue the business.

(1) *Meyer v. Sharpe*, *ibid.* 2 Vern. 293. *Goss v. Dufresnoy*,

(2) *Ex parte Hunter*, 2 Rose, Davies, 371.

382. (4) *Smith v. De Sylva*, Cowp.

(3) *Richardson v. Gooding*, 469.

*Effect of  
bank-  
ruptcy.*

*Rights of  
solvent  
partner as  
to the sur-  
plus.*

*Effect of  
payment  
of divi-  
dend, as to  
solvent  
partner.*

*Conse-  
quences of  
bankrupt  
partner  
embez-  
zling joint  
property.*

by the solvent partners, as far as the profits might have been produced by an application of such capital. (1)

If there is a surplus under a separate commission against the bankrupt partner, the solvent partner may apply by petition for an account of such surplus, and for payment of his proportion of it. (2)

The payment of a dividend, under a commission against one partner, raises a new assumpsit by the other, so as to deprive that other partner of the benefit of the statute of limitations. (3)

Where a solvent partner had paid the other before his bankruptcy a sum of money to be applied in discharge of a joint debt, and the latter converted the money to his own use — and the solvent partner was, after the bankruptcy of the other, compelled to pay the whole debt to the creditor, — the bankrupt partner was held in this case (by reason of the fraud) not protected by his certificate, in respect of the share of the joint debt paid by his copartner (4) after the bankruptcy. This case, however, was decided before Sir Samuel Romilly's act; which first enabled a surety, paying money after the bankruptcy of the principal, to prove it as a debt under the commission. Therefore, if such a case can be considered as divested of *fraud* on the part of the bankrupt partner, and the solvent partner had an opportunity of proving under the commission, the certificate would now operate as a discharge of the claim of the solvent partner.

(1) *Crawshay v. Collins*, 15 Ves. 218.

(2) *Ex parte Lanfear*, 1 Rose, 442.

(3) *Ex parte Deodney*, 15 Ves. 499.

(4) *Wright v. Hunter*, 1 East, 20.; and see ante, 612.

## SECTION II.

*What is JOINT, and what SEPARATE, Property under a Joint or Separate Commission.*

When a *separate* commission issues against either one or more members of a partnership, all transactions affecting the joint property have been said to be *overreached* by the act of bankruptcy of the bankrupt partner, that is, so far as that a joint creditor will not (as we have just seen) be allowed afterwards to proceed against the joint effects by foreign attachment (1) — the assignees of the bankrupt partner taking all the separate property, and all the bankrupt's interest in the joint property, and holding the latter as tenants in common with the solvent partner. The assignees of the bankrupt partner, however, are not strictly partners with the solvent partner; though a necessary community of interest remains between them till the partnership affairs are thoroughly wound up, requiring that what was partnership property before, shall continue so for the purpose of a distribution among the partnership creditors, as well as of a division of the surplus in proportion to the respective interests of the partners. (2) And the arrangement of such interest will be made, not as the partner stood at the time of the commission (3), but of the act of bankruptcy. The right of the assignees, as to the joint property, has been said to be derived more from the rule of the common law, (as far as it respects trade between partners) than from any rule arising out of the bankrupt laws; and the interest which they take in it can only be made available, upon the balance of accounts between the partnership and the bankrupt partner; in stating which account enough must be left to cover partnership debts. (4)

Interest of  
the as-  
signees  
under a  
separate  
commis-  
sion.

(1) Sed vide ante, page 631. et seq.

(2) 6 Ves. 126.

(3) Ibid.

(4) *Field v. ———*, 4 Ves. 597.

*What joint, and what separate property.*

Their power as to the joint property.

As to consolidating joint and separate estates.

When there is an assignment by a retiring to a continuing partner.

The assignees, therefore, under a separate commission are entitled to deal with the joint property, as the solvent partner himself might have dealt with it — that is to say, paying all the joint creditors equally as far as the joint property goes, and applying the surplus under all the equities subsisting between the partners. (1) Under special circumstances, however, an injunction may be applied for by the solvent partner against the sale of the property by the assignees, upon his offering to account (2); but this, it is apprehended, will only be granted where a sacrifice is about to be made of the property, or there is some irregularity in the sale; or, where the solvent partner engages to pay over to the assignees the value of the share of the bankrupt partner in the property offered for sale.

It is sometimes thought expedient to consolidate the joint and separate estates; but the Lord Chancellor will not sanction such a measure, without a reference to the commissioners to inquire and report, whether such a proceeding would be for the general benefit of the creditors. (3)

The equities subsisting between partners involve the consideration of the effect of an assignment of partnership property by a *retiring* to a *continuing* partner — and, in what cases, any portion of the *joint property* of the partnership becomes (by such assignment) *separate estate*. This depends altogether upon the *bona fides* of the transaction between the partners, and the non-interference of the joint creditors at the time of the transaction. The mere *dissolution* of a partnership, indeed, does no more than declare that the partnership is not to be carried on any further, except for the purpose of winding up the concerns; and he, who has the actual possession of the joint property, has it (in that event) clothed with a trust for the other, to apply it in payment of the joint debts. This will so far qualify the nature

(1) *Barker v. Goodair*, 11 Ves. 85. *Dutton v. Morrison*, 17 Ves. 209. *Hankey v. Garrett*, 5 Bro. 457. 1 Ves. jun. 236. (2) *Allen v. Kilbie*, 4 Mad. 464. (3) *Ex parte Strutt*, 1 G. & J. 29.

of his possession, that the specific effects or debts will not be considered to be *solely* in his order and disposition, to the prejudice of the claims of the other partner. But, if upon a fair and open dissolution of a partnership, the partner retiring, either by deed or otherwise, *bonâ fide* transfers his interest in the partnership effects to the continuing partner — who afterwards carries on the trade and becomes a bankrupt before all the joint creditors have been paid; — in this case, the joint creditors have no equity, either upon the partnership effects remaining in specie, or the outstanding debts. (1) Therefore, where an outgoing partner assigned by deed his share of the stock to the continuing partners, and they and a surety covenanted that they would in due time discharge all the partnership debts, and indemnify the outgoing partner — and six months after the dissolution, the continuing partners became bankrupt, and the outgoing partner was arrested by creditors of the old partnership; — he was held, upon petition, not entitled to have the specific stock and debts of the old partnership applied in satisfaction of the creditors of that partnership, in preference to the creditors of the (2) new firm. In such a case, however, it is very easy for a retiring partner to provide for his own indemnity, by assigning all the effects *upon trust to pay the debts.* (3) But, where a retiring partner assigned the partnership estate and effects to a continuing partner, in consideration of the continuing partner accepting certain bills of exchange — and afterwards the continuing partner having refused to accept the bills,

*What joint, and what separate property.*

(1) *Ex parte Ruffin*, 6 Ves. 119. *Ex parte Williams*, 11 Ves. 3. *Ex parte Slow*, C. B. L. 539.; and see *ex parte Harris*, 1 Mad. 583. There is an old case before Lord Hardwicke, (*ex parte Burnaby*, 1 C. B. L. 246.) which seems somewhat at variance with the doctrine in the text. It is not, however, (as Lord Eldon observed in *ex parte Ruffin*) very intelligible; and his Lordship

thought also, there was a material distinction in that case; inasmuch as the assignment *there* was, not by one partner to the *other two*, but only to *one* of the other two. It does not, moreover, appear in that case, that the assigning partner had *actually retired* from the business.

(2) *Ex parte Fell*, 10 Ves. 347.

(3) *Ibid.*

*What joint, and what separate property.*

an injunction was granted against him, and a receiver appointed upon a bill filed by the retiring partner; — upon the subsequent bankruptcy of the continuing partner, it was held, that the previous interference of the court restored the property to its original character as joint property, unless the plaintiff in equity had (by his conduct between the time of his obtaining the injunction and the bankruptcy) rendered nugatory the effect of such interference. (1)

Where the joint property left in the possession of the continuing partner.

Upon a dissolution of partnership between A. and B., it was agreed, that until A. was provided for, B. should continue the business, and allow him a third of the profits: B. afterwards formed a partnership with C., and carried into it the stock of A. and B., and a commission of bankrupt issued against B. and C.; — it was held, under these circumstances, that the joint property of A. and B. having been permitted by A. to become property visible to all the world of the new partnership of B. and C., the share of B. in the residue of the joint effects was the *separate* property of B., and subject to the payment of his separate creditors. (2)

When new partners are taken in, as to liability of the new capital.

Where new partners, however, are taken into a trade — and it is agreed that the stock, and the debts due to the old firm, should become the capital of the new partnership, and that the new firm should take upon itself the payment of the debts of the old firm — and the new partnership became bankrupt; — in this case, the joint effects of the new firm were held liable to the joint creditors of the old firm, as well as to the joint creditors of the new firm. (3)

Assignment will have no effect, unless accompanied

But, though partners may *bonâ fide* agree to dissolve their partnership, and that what was joint property before shall thenceforth become the separate property of him who continues the business, yet such agreement will have no

(1) Ex parte Rowlandson, 1 Rose, 516. 2 Ves. & B. 172.

(2) Ex parte Barrow, 2 Rose, 252.

(3) Ex parte Bingham, 1 C. B. L. 538. Ex parte Clowes, 2 Bro. 395. 1 C. B. L. 250. In re Stapler, *ibid.* 538. Ex parte Petle, 5 Ves. 602.

effect, unless *possession* of the property be given pursuant to the contract. And, if there is any *fraud* in the transaction — as if one partner retires when the partnership is really insolvent, and (before the partnership debts are discharged) the continuing partners pay to him large sums of money on account of his share in the business, — such payments are fraudulent and void against the joint creditors. (1) But the mere circumstance of the partnership being insolvent, at the time of the dissolution of it by the retirement of one partner, will not *alone* be sufficient to invalidate a dissolution fairly made, however it may affect his rights to his share of the property, as against the then joint creditors. (2)

*What joint, and what separate property.*

with possession.

Where payments to retiring partner fraudulent.

If real estates are purchased with the partnership funds, though conveyed only to one partner, they are nevertheless partnership property. But if estates are purchased with the partnership fund, and conveyed to one partner under a *specific agreement* that the estates shall be *his*, and that he shall be debtor for the money to the partnership, the estates are in this case his *separate* property. (3)

Where real estates purchased with partnership fund.

Where one of two partners purchased ships with the partnership property — and upon a discovery of the transaction by the other partner, the ships were brought into the partnership account, and the disbursements paid out of the partnership funds, but the registers continued unaltered, for the purpose of enabling the other partner to evade penalties, to which (as a member of parliament) he would have been liable on account of the ships being employed in the service of government — and upon his death a commission of bankrupt was issued against the partner, in whose name the ships were registered; — it was held,

As to ships paid for out of partnership funds, but registered in name of one partner.

(1) *Anderson v. Maltby*, 4 Bro. 423. 2 Ves. jun. 244. A fraudulent assignment of property by one partner to another, though an act of bankruptcy in the assignor, does not, as we have before had occasion to observe, amount to such in

the assignee. *Whitwell v. Thompson*, 1 Esp. 68. 72.; and see ante, page 74.

(2) *Ex parte Peake*, 1 Mad. 555.

(3) *Smith v. Smith*, 5 Ves. 189. *Lyster v. Dollond*, 1 Ves. jun. 435. *Thornton v. Dixon*, 3 Bro. 199.

*What joint, and what separate property.*

Whether registry conclusive proof of ownership.

Insurance of interest of joint owner.

Where three partners sell their goods elsewhere in the name of two.

Liability of joint estate to expenses.

When property considered as joint property.

under these circumstances, that the ships were distributable as the *separate* property (1) of the bankrupt partner. This case was decided with reference to the policy of the then registry acts, the 26 G. 3. c. 60. and 34 G. 3. c. 68.; and other cases also, under those acts, have decided that the registry of a ship was conclusive evidence of property, even against the claim of creditors upon a joint purchase (2), and various acts of apparent ownership. In a subsequent case, however, under a commission against two partners, it has been held, that where ships are purchased or built, and paid for out of the partnership funds, though they are registered in the name of one of the partners, yet, being in the ordering and disposition of both, the ships form part of the *joint* estate. (3)

If one joint owner of a ship insures his share or interest, and a loss happens, the money recovered upon the insurance will be separate property. (4)

Where *three* partners were manufacturers in Lancashire, and sold their goods in the name of *two* only, and a credit was acquired by them, as three in Lancashire, and two in London, — the distribution of their property in Bankruptcy was held to be, where the order and disposition was at the time of the bankruptcy. (5)

Whatever expense assignees under a separate commission have been put to in getting in the joint estate, must be reimbursed out of the joint estate. (6)

Although the *property* of a partnership be only in *one* or *more* members of it, with an interest in the *profits* merely in the others, — yet, in Bankruptcy, the property is administered, with respect to the claims of the joint creditors, as belonging to *all* the partners. (7)

(1) *Curtis v. Perry*, 6 Ves. 739.

(2) *Camden v. Anderson*, 3 T. R. 709. *Ex parte Yallop*, 15 Ves. 60. *Ex parte Houghton*. *Ex parte Gribble*, 17 Ves. 251. 1 Rose, 177.

(3) *Ex parte Burn*, 2 Jac. & W. 378.; and see ante, 421.

(4) *Ex parte Perry*, 5 Ves. 575.

*Ex parte Brown*, 6 Ves. 136.

(5) *In re Shakeshaft*, cit. 6 Ves. 747.

(6) *Ex parte Rutherford*, 1 Ross, 201.

(7) *Ex parte Hunter*, 2 Rose, 382.



## SECTION III.

*What is a JOINT, and what a SEPARATE, DEBT.*

A partner, dealing in the name of the partnership, may by simple contract bind his copartners without their express assent (1); and this even in a matter not relating to the partnership, provided the person, with whom such partner deals, has *no notice* that he is dealing on his separate account. But, if it is manifest to a person advancing money to an individual partner, that it is upon his *separate* account (and therefore against good faith that such partner should pledge the partnership), it is then incumbent on the person dealing with him to shew, that the partner had some *authority* to bind the partnership (2); otherwise the firm will not be liable. Therefore in a recent case, where one partner gave an acceptance in the name of the firm, in satisfaction of his own private debt, and *without* the knowledge of his co-partner, the Vice-Chancellor held that such an acceptance did not bind the joint estate. (3)

When one partner can bind his co-partners.

The authority, indeed, of one partner in drawing or accepting bills is only an implied authority, and may be rebutted by express previous notice to the party taking the bill, that the other partner would not be liable for it, — even though the partner giving the bill represented to the holder, that the money (advanced by him as a consideration for the bill) was to be applied to partnership purposes — and though the greater part was in fact so applied. (4) Where the other partners, however, are in any way privy to the transaction, and permit him to go on with it, or to repeat it, without expressing any disapprobation, they will then be considered to have approved of the act of the

Authority to accept bills may be rescinded by notice of the other partner.

(1) *Ex parte Gardome*, 15 Ves. 286.

(2) *Ex parte Peele*, 6 Ves. 602. *Arden v. Sharpe*, 2 Esp. 524.

(3) *Ex parte Goulding*, Sittings after Trinity Term, 1826.

(4) *Lord Galway v. Mathew*, 1 Camp. 403. 10 East, 264.

*What a joint, or separate debt.*

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partner so pledging the partnership name; and such subsequent approbation will be equivalent to previous consent. (1) And the act of one partner, done with reference to business transacted by the firm, will bind all the partners, although it be out of the regular course of trade, and be contrary to an express arrangement amongst themselves; because it is within the scope of his authority. (2)

*When mis-application of trust money by one partner.*

If one of several partners apply trust property, *with the privity of the other partners*, to the purposes of the partnership, the debt may be proved either against the joint estate, or the separate estate of the partner so misapplying the money. (3) But if the other partners have *no knowledge* whatever that the money is *trust money*, then there can be no proof against the joint estate. (4)

*Where a new partner bound by an engagement of the firm for an old debt.*

Where partners, who have previously contracted debts, take a fresh person into partnership, and give paper of the new firm to a creditor in payment of a previous debt, such transaction (without evidence of the assent of the new partner) will not be binding upon him (5), provided the party taking the security had either actual knowledge, or by necessary inference must have known, that the payment was without the consent of the new partner. But, where the creditor receives it *bonâ fide* without such knowledge at the time, no subsequently acquired knowledge, of the misconduct of the partner giving the security, can disaffirm the transaction. (6)

*Where money applied for partnership purposes, with the privity*

The joint responsibility of partners cannot be established, after the separate liability of a single partner was originally contemplated. (7) But in a case, where a bill was drawn by one of the partners upon the partnership firm with the privity of the other partner, which, though not accepted,

(1) Ex parte *Bonbonus*, 8 Ves. 541.

(2) *Sandilands v. Marsh*, 2 B. & A. 673.

(3) Ex parte *Watson*, 2 Ves. & B. 414. *Smith v. Jameson*, 5 T.R. 601.

(4) Ex parte *Apsey*, 3 Bro. 265. Ex parte *Heaton*, Buck, 586.

(5) *Sherriff v. Wilks*, 1 East, 48. *Hope v. Cust*, cit. *ibid*.

(6) *Swan v. Steele*, 7 East, 210. *Ridley v. Taylor*, 13 East, 175.

(7) *Enly v. Lye*, 15 East, 7.

was discounted by the payee, and the proceeds applied to the use of the partnership,—it was held, that the payee might sue both partners for the money, although they had incurred no joint liability on the bill. (1) And the same, where a holder had discounted bills drawn by one partner and indorsed by another, and the money received by means of the bills had been applied for partnership purposes. (2)

*What a joint, or separate debt.*

*of all the partners.*

Where a *joint creditor* of a partnership takes the *separate security* of one of the partners, the others are thereby discharged (3), unless their liability be expressly reserved. (4) But mere information to a creditor, that a partnership was dissolved, and that one of the partners had taken upon himself to discharge the creditor's debt, was held not to bar him of his right against the other partner, notwithstanding even the creditor might expressly agree to exonerate the other partner from all responsibility; for an agreement to abandon a legal claim, unless there be a *consideration* shewn, is a mere *nudum pactum*; and the arrangement between the partners will not deprive the creditor of his original claim, unless he is a party to it himself, and it amounts to satisfaction. (5)

*As to taking separate security of one partner for a joint debt.*

In the case of a *dormant partner*—when the ostensible partner accepts bills in his own name, though the creditor has no notice that there is a dormant partner at the time he takes the bills, this will not be a discharge of the dormant partner, but he will become liable the moment he is known to the creditor. (6) Wherever, indeed, there is a dormant partner, and the fact was unknown to the creditor, it is an invariable rule in Bankruptcy, that the creditor has an option to consider his debt as either (7) joint or separate.

*When a dormant partner liable.*

(1) *Denton v. Rodie*, 3 Camp. 495.

(2) *Ex parte Bolitho*, Buck, 100.

(3) *Evans v. Drummond*, 4 Esp. 89. *Reed v. White*, 5 Esp. 122.

(4) *Bedford v. Deakin*, 2 B. & A. 210.

(5) *Lodge v. Dicus*, 3 B. & A. 611.

(6) *Robinson v. Wilkinson*, 3 Pri. 638.

(7) *Ex parte Hamper*, 17 Ves. 403.

*Ex parte Mathews*, 18 Ves. 125.

*Ex parte Hodgkinson*, 19 Ves. 294.

*Ex parte Norfolk*, *ibid.* 458.; and see *Binford v. Dommett*, 4 Ves. 756.

*Proof by  
JOINT cre-  
ditors.*

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other cases (without adverting to the consideration whether there were any joint effects or not) when the justice of the case required it, he allowed the same proof, — declaring, that debts, whether sole or joint, ought to be paid out of a bankrupt's estate; which, in the case of a partnership, he observed, was composed of his separate estate, and of his moiety of the (1) joint estate. And the principle he acted upon was this — that a joint creditor should not be deprived by a commission of bankruptcy of the rights, which he possessed at law against the separate estates, as well as against the joint estate. For, if a joint creditor of several partners had brought an action against all, he might have taken out separate executions against each; and, therefore, a commission of bankruptcy — being an execution for all the creditors, and preventing him from suing out his execution at law with effect — ought to be considered (at least) as beneficial an execution for *him*, as for any other creditor of the bankrupt. But this principle was entirely departed from by Lord Loughborough, whose decision has been subsequently followed by Lord Eldon; and it is now a settled rule, that a joint creditor is not entitled to receive dividends from a separate estate — if there is *any* joint fund (however small in amount) or any solvent partner — until the separate creditors are paid 20s. in the pound. (2) If the joint property, however, be of such a nature and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or (in point of expense) an unwarrantable attempt, — such a case, it has been admitted, would authorise a departure from the rule, on the ground that there would then be in truth no joint property. (3) And so, where the only joint effects were such as were pledged for more than

(1) *Ex parte Hodgson*, 2 Bro. 5. *Ex parte Taitt*, 16 Ves. 193. *Ex parte*  
*Ex parte Page*, *ibid.* 119. *Ex parte Peake*, 2 Rose, 54. *In re Lee*,  
*parte Flintum*, *ibid.* 120. *Ex parte* *ibid.* note.  
*Copland*, 1 C. B. L. 236. (3) *Ex parte Peake*, 2 Rose, 54.  
(2) *Ex parte Clay*, 6 Ves. 813. per Lord Eldon.  
*Ex parte Sadler*, 15 Ves. 52. *Ex*

their amount; for in this case it was likewise considered, *Proof by* that there were *no joint effects* under the administration of *JOINT cre-* the assignees to distribute. (1) *ditors.*

(1) *Ex parte Hill*, 2 N. R. 191 a. The exclusion, in Bankruptcy, of joint creditors from a share of the separate property, bears no analogy to proceedings at law, which give a joint creditor the right to come (under an execution) at once against the separate estate of his joint debtor, as well as against the joint estate, until he has satisfied his debt. The propriety of such exclusion, too, seems somewhat difficult to be supported; for, as Sir W. Evans has justly observed, (Evans's Bankrupt Stat. 211.) it should be recollected, that the credit obtained by a partnership is often founded, not so much upon a consideration of the capital, which may be supposed to be invested in the concern, as upon the known personal opulence of the several individuals who compose it. And the above rule, of not permitting joint creditors to prove against the separate estate, if there is *any* portion of joint property, however small the amount, it must be confessed, is often inconsistent in its operation, and productive of great injustice when carried to the extent to which it sometimes is. For instance, if the joint effects amount only to 1*l.* 11*s.* 6*d.* (*Ex parte Peake*, 2 Rose, 54.) the joint creditors are refused permission to take dividends under any of the separate estates before the separate creditors are paid 20*s.* in the pound; whilst, if there should happen (fortunately for the joint creditor) to be not a farthing of joint property, he is then permitted to receive from every one of the separate estates an equal dividend with every separate creditor. Mr. Christian, in his *Treatise on the former Bankrupt Laws* (vol. ii. 36.),

as well as Sir William Evans in his letter to Sir Samuel Romilly, very ably demonstrate the inconsistency of the rule, and the absurd consequences which follow from too strict an adherence to it. As suppose a case, where there are five partners, each having a separate estate of 20,000*l.*, and separate debts to the same amount, and the joint debts amount to 100,000*l.*—if there should be only 10*l.* worth of joint property, this would be all that could be divided among the joint creditors until the separate creditors are paid in full; a joint creditor of 20,000*l.* would, therefore, not get a farthing in the pound, while the separate creditor to the same amount would receive the whole of his debt. On the other hand, if there should be no joint estate, then each joint creditor would be admitted to prove against every separate estate, and would accordingly receive 5*s.* 4*d.* in the pound from *each* separate estate, amounting to 16,666*l.* 18*s.* 4*d.* in the whole—while each separate creditor would receive only 3*s.* 4*d.* in the pound from *one* estate, amounting but to 3333*l.* 6*s.* 8*d.* So that from the mere circumstance of there being *no joint effects*, the joint creditor would get five sixths, and the separate creditors but one sixth of their debts.

A more equitable mode of distribution is suggested by Mr. Christian and Sir William Evans (Evans's Bankrupt Statutes, 211.); namely, that as each partner ought to pay his own private debts, and his proper share of the joint debts,—and the effects he has to pay withal are his separate estate, and his share of the joint estate;—every joint creditor ought, therefore, to be al-

*Proof by  
JOINT cre-  
ditors.*

When  
joint pro-  
perty is  
received  
after proof  
against  
separate  
estate.

Where  
there is a  
*solvent*  
partner.

Where, under special circumstances, an order is obtained by the joint creditors to prove against separate estates — and they prove against one or more of them exclusively of the rest — if any joint property is afterwards realized, the estates so burdened by the proof are entitled to be reimbursed out of such joint property, to the extent of the proofs made against them, before such joint property is divisible between the separate estates. (1)

If there is a *solvent partner*, though there may be no joint property, the joint creditor is in this case not permitted to prove under a separate commission against the bankrupt partner, on the ground that this would materially affect the interests of the separate creditors. (2) For, as Lord Loughborough observed, if after so proving his debt, a joint creditor was to receive a dividend of 10s. in the pound, the assignees of the bankrupt partner would have no claim against the solvent one; as the solvent partner would in that case be entitled to set-off, as against them, the other moiety of the debt, which he himself might have paid to the creditor. But, in case the creditor first sues the solvent partner, and recovers the whole debt against him, the latter could then come in as a separate creditor

lowed to prove a just *portion of his debt* under each partner's estate, and take a dividend with the separate creditors from the aggregate of the separate estate, and the share of the joint. But since every partner must not only pay his own share, but is a surety for the other partners — accordingly, if there is a surplus in any instance of this aggregate fund, then, that the surplus ought to be applied to the benefit of the joint creditors, to make up the deficiency which they may experience by the dividends of the other partners. Whatever system, however, of proof or distribution might be adopted, it is submitted, that the Lord Chancellor possesses an equitable jurisdiction in Bank-

ruptcy quite sufficient to enable him to depart occasionally from any general rule, convenient as it may be in ordinary practice, when too rigorous an observance of it would work manifest absurdity and injustice. And as *several exceptions* and departures from the above rule have been already admitted to prevail, (only one of which, it may be remarked in passing, is noticed in the 62d section of the new act,) a still further relaxation of it on the principle acted on by Lord Thurlow, might, it is apprehended, be attended with considerable advantage.

(1) Ex parte *Willock*, 2 Rose, 392.

(2) Ex parte *Kensington*, 14 Ves. 447. Ex parte *Kendall*, *ibid.* 449.

of the bankrupt, to the amount only of a moiety of the debt — for he could have recovered only a moiety of the debt against his co-partner if he had continued solvent ; — a circumstance which, it will be readily perceived, occasions a great difference in the fund divisible amongst the separate creditors. (1)

*Proof by  
JOINT cre-  
ditors.*  
——

Where, however, the solvent partner is *abroad* and not likely to return, and there is no joint property — a joint creditor, in such a case, will be permitted to prove under a separate commission for the purpose of receiving dividends (2); and where there is *no solvent partner at the time* when the joint creditor applies to prove, such proof will be also admitted, notwithstanding there was a solvent partner at the time of issuing the commission. (3) But it has been determined, that the *mere insolvency* of the co-partner does not entitle the joint creditor to prove upon the separate estate of the other partner; the principle being that, whilst there is any other fund (however small) to resort to, the joint creditor cannot prove against the separate estate of the bankrupt partner; and there being no reason, as was suggested in this case, because a man is insolvent, that he may not still be able to pay a considerable portion of his debts. (4)

*Where  
solvent  
partner  
abroad, or  
where  
none at  
the time of  
proof.*

*Insolvency  
alone does  
not war-  
rant proof  
against the  
other  
partner.*

Where several firms are engaged in a joint adventure, to which there is no joint property appertaining, the creditors of the adventure must prove against the separate estates of the different individuals, and not against the estates of the different firms. (5)

*Where a  
joint ad-  
venture  
without  
joint pro-  
perty.*

(1) *Ex parte Elton*, 3 Ves. 240. Sir Wm. Evans points out the injustice of this rule, as it affects the solvent partner. "The sub-jecting," he says, "one partner to a loss, for which he is not originally liable, merely for the sake of giving the creditors of the other the distribution of a greater property than actually belongs to the person, to whose rights they have succeeded, can-

"not be reconciled with any principle of reason or justice." See *Evans's Bankrupt Statutes*, 215.

(2) *Ex parte Pinkerton*, 6 Ves. 814.; and see *Ex parte Machell*, 2 V. & B. 216.

(3) *Ex parte Jones*, 1 Mont. Dig. 238.

(4) *Ex parte Janson*, 3 Mad. 229. Buck, 227.

(5) *Ex parte Wylie*, 2 Rose, 393.



*Proof by  
JOINT cre-  
ditors.*

As to or-  
der for  
distinct  
accounts.

Upon the issuing of a separate commission against one of several partners—as it frequently happens that the assignees possess themselves of the partnership property, the Lord Chancellor will (upon the petition of the joint creditors) after the choice of assignees, order distinct accounts to be kept of the joint and separate estates; and that what shall be found to belong to the bankrupt in respect of his share and proportion of the *partnership estate*, shall be applied by the assignees in the first place towards satisfaction of the *partnership creditors*; and that what shall belong to the *separate estate* of the bankrupt shall be applied, in like manner, in the first place towards satisfaction of the *separate creditors*. (1)

Where  
joint pro-  
perty  
taken un-  
der sepa-  
rate com-  
mission.

Where  
joint cre-  
ditor has  
the privi-  
lege of  
election as  
to proof.

Where partnership property, also, was supposed to have been taken under the separate commission, joint creditors were then allowed to come in; and, in two modern instances, they were permitted to vote in the choice of assignees. (2)

A joint creditor (who is the *petitioning creditor* under a *separate* commission) has the privilege of election, either to make his proof against the separate, or the joint, estate. (3) On the other hand, by suing out a *joint commission*, he binds himself to resort to the joint property. But where a joint creditor sued out two separate commissions against two partners—and proved under one against the joint estate, and received a dividend—he was held not to have concluded himself to prove as a joint creditor against the other partner; but that, on refunding the dividend with interest, he might still prove as a separate creditor under the commission against such other partner. (4) Where, however, a joint

(1) Ex parte *Aspinwell*, 1 C. B. L. 247. Ex parte *Meroy*, *ibid.* Ex parte *Hill*, *ibid.* Ex parte *Thomas*, *ibid.* Formerly the application must have been made by bill, unless the petition was consented to. Ex parte *Voguel*, 1 Atk. 132. *Hankey v. Garratt*, 3 Bro. 457. 1 C. B. L. 244. 247.

(2) Ex parte *Jones*, 18 Ves. 283. Ex parte *Taylor*, *ibid.* 284.

(3) Ex parte *Hall*, 9 Ves. 349. Ex parte *Ackerman*, 14 Ves. 604. Ex parte *De Tastet*, 1 Rose, 10. 17 Ves. 247.

(4) Ex parte *Bolton*, 2 Rose, 389. 1 Buck, 7. Ex parte *Crisp*, 1 Atk. 134.; and see *Heath v. Hall*, 4 Taunt. 326. *Young v. Hunter*, 16 East, 252.



creditor sues out a commission against A. "as surviving partner of B.," he can then only prove against the joint estate. (1) And a joint creditor, having joint property of two bankrupts in pledge and selling the same after their bankruptcy, may nevertheless prove the remainder of his debt against the separate estates of both the bankrupts, if there is no other joint property. (2)

*Proof by  
JOINT cre-  
ditors.*  
——

Where there are no separate debts, or where the joint creditors will consent to pay all the separate creditors 20s. in the pound, they will then be admitted to prove their debts under a separate commission for the purpose of receiving dividends. (3) But a mere offer to pay the separate debts will not be sufficient, without some proof before the court (4) as to their amount.

*When  
joint cre-  
ditors may  
prove un-  
der a sepa-  
rate com-  
mission.*

If a trustee will suffer his co-trustee to detain a sum of money belonging to the trust estate, they are both severally liable; and if both become bankrupt, the debt may be proved against each (5) of the estates.

*As to  
proof  
against  
trustees.*

Though a partner withdraws the monies of the partnership for his separate use, yet if he openly and duly enters the sum so withdrawn in the partnership books, this is not such a fraud as will entitle the joint creditors to prove against his separate estate; otherwise, if by the entries of the books he disguises the transaction, or wholly omits, or conceals it. (6)

*Where  
one part-  
ner with-  
draws  
partner-  
ship mo-  
nies for his  
private  
use.*

Judgment of outlawry against two of three joint debtors does not make the debt a separate one, as against the third debtor; and it cannot be proved (7) under his separate commission.

*Judgment  
of outlaw-  
ry against  
some of  
the part-  
ners.*

(1) *Ex parte Barned*, 1 G. & J. 309.

(2) *Ex parte Geller*, 2 Mad. 262.

(3) *Ex parte Chandler*, 9 Ves. 35.  
*Ex parte Hubbard*, 13 Ves. 424. *Ex parte More* and *Ex parte Thomas*, cit. *ibid.*

(4) *Ex parte Taitt*, 16 Ves. 193.

(5) *Keble v. Thompson*, 3 Bro.

111.

(6) *Ex parte Smith*, 1 G. & J. 74.

(7) *Ex parte Dunlop*, Buck, 253.

## SECTION V.

*Of Proof by SEPARATE CREDITORS under a joint Commission.*

Limited  
right of  
proof.

Accounts  
to be taken  
of the  
different  
estates.

Overplus  
of joint  
estate to  
go to the  
separate  
creditors.

The *separate creditors* under a *joint commission* are not permitted to come in *directly* upon the joint estate; they may, however, prove for the purpose of assenting to or dissenting from the certificate, but have no right to receive dividends of the joint property until all the joint creditors have received 20s. in the pound. The rights of the separate creditors are (like those of the joint creditors which we have considered in the preceding section) more particularly defined by the general order of Lord Loughborough (1) before referred to; by which it is directed, that in a joint commission against two or more bankrupts the commissioners may admit the proof (2) of any separate debts of any one or more of such bankrupts, and such separate creditors shall be at liberty to assent to or dissent from the allowance of the certificate of the bankrupt, of whom they shall be separate creditors. Distinct accounts are also ordered to be kept of the separate estates, as well as of the joint estate; and what shall be found to belong to the separate estates is to be applied in the first place towards satisfaction of the debts of the respective separate creditors. And in case there shall be any overplus of the joint estate after all the joint creditors shall be paid and satisfied their whole demands, the respective shares of the bankrupts in such overplus are to be carried to the account of their respective separate estates, and be applied towards satisfaction of their respective separate debts. This arrangement was formerly made upon *peti-*

(1) 8th March, 1794.

(2) The practice was formerly to let in the separate creditors, upon petition, to prove their debts

under the joint commission, they paying contribution to the charge of it. 1 C. B. L. 232.

tion in each particular case; but it is now, in pursuance of this order, done by the commissioners. The costs of taking the accounts are directed to be paid out of the separate estates, and to be settled by the commissioners in case the parties differ about them.

*Proof by  
SEPARATE  
creditors.*  
—

Under this order, where a firm of four persons became bankrupt, three of whom carried on a distinct business under a different firm, the creditors of the latter firm were held entitled to prove against the distinct estate of the three, without any special order; such a case being within the meaning, though not the words, of the general order. (1)

*Proof may  
be made  
without a  
special  
order.*

Where two partners agreed to borrow a sum of money for the use of the partnership, but one of them only gave a bond for securing the payment—which was, however, witnessed by the other partner—and the money was afterwards entered in the cash-book of the partnership,—Lord King, upon petition, directed the obligee in the bond to be admitted a creditor against the joint estate. (2) So, where a creditor lent money to two of the members of a partnership upon the joint notes of the two partners, and upon their separate bonds,—and the whole of the money was applied to the use of the partnership (which consisted of them and several others) and the partners all agreed to consolidate the separate debts, and to consider them as the debts of the entire partnership,—Lord Thurlow, upon petition, permitted the creditor to prove the whole amount against the joint estate of the partnership. (3) But where a sole trader became indebted by bond, and then took in a nominal partner, and some time afterwards a joint commission was issued,—the separate creditor in this case was not permitted to prove against the joint estate. If, however, any interest had been paid upon the bond by both partners, they would then have been considered to have adopted the debt, and the partnership would have

*Securities  
given by  
one part-  
ner, for  
money ap-  
plied to  
partner-  
ship pur-  
poses.*

*What is an  
adoption  
of a sepa-  
rate debt  
by the  
partner-  
ship.*

(1) *Ex parte Worthington*, 3 Mad.  
26.

(2) *Ex parte Brown*, 1 Atk. 225.

(3) *Ex parte Clowes*, 2 Bro. 595.

*Proof by  
SEPARATE  
creditors.*  
——

been liable to it. (1) But where A., being indebted to several persons, entered into partnership with B., and brought his stock in trade into the partnership—and by the articles between them it was agreed that the joint trade should pay the creditors of A. named in a schedule,—Lord Eldon held, that a separate creditor of A. (though named in the schedule) did not, in the absence of all evidence of any assent on his part to such agreement, become a joint creditor of A. and B., and could not, therefore, prove against their joint estate. (2)

*As to trust  
money ap-  
plied by  
one part-  
ner to  
partner-  
ship pur-  
poses.*

If one partner (being a trustee) brings trust money into the trade *without the knowledge* of his co-partner, it cannot be proved as a joint debt; for, though the partner abuses his trust by advancing the money to the partnership, it will not raise a contract between the partnership and the *cestui que trust*. (3) Neither can money borrowed by one partner to pay for an estate, but applied by him to pay partnership debts, be proved by the lender against the joint estate. (4) But where one of two partners applied trust money for the purposes of the trade, *with the privity* of the other partner, both in that case were held liable to make good the trust money; and though they afterwards dissolved their partnership, and the partnership effects were assigned over to the first, who took on him the payment of the debts, this was held to be no discharge of the other partner. (5) So, where one of three partners died intestate, leaving a widow and infant children—and his widow administered, and agreed with the surviving partners that her late husband's share of the partnership property should continue in the firm (of which she constituted one with them) for a term of years, and the firm became bankrupt,—Lord Eldon held, that though the administratrix committed a breach of trust by continuing the

(1) *Ex parte Jackson*, 1 Ves. jun. 181.

(2) *Ex parte Williams*, 1 Buck, 13.

(3) *Ex parte Apsey*, 3 Bro. 265.

(4) *Ex parte Wheatley*, 1 C. B. L. 537.

(5) *Smith v. Jameson*, 5 T. R. 601.; and see ante, 644.

money in the trade, yet as the partners knew that a certain proportion of the property belonged to the children, they held the money as debtors to the children, and as if it had been placed with them by way of direct loan; and that though the children might have proved against the separate estate of their mother (if it had been for their benefit to do so), they might equally prove against the partners, who had possessed themselves of the property of the infants under circumstances raising a clear assumpsit. (1) And indeed generally, when any partner (being a trustee of funds) makes use of them for partnership purposes with the knowledge of the other partners, the *cestui que trusts* may prove against the joint estate. (2)

Proof by  
SEPARATE  
creditors.

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Where a broker insured with an underwriter, who underwrote separately but had partners — and the broker kept an account with the partnership, — the Court held, that the proof could not be made against the joint estate (an insurance with a partnership being then prohibited by the 6 G. 1. c. 18. (3)); but the debt was ordered to be proved against the separate estate. (4)

Where  
joint deal-  
ings pro-  
hibited by  
law, proof  
cannot be  
made  
against the  
joint  
estate.

## SECTION VI.

*Of Proof by Creditors holding joint and several Securities;  
and herein of the Creditor's ELECTION to prove against  
the joint or separate Estates.*

A creditor, who has a joint and several security, may come in either against the *joint*, or the *separate*, estates; but he must make his *election*, for he cannot prove against both estates at the same time. And this accords with the well known rule of law as to the right of action

Joint and  
several  
creditor  
must elect  
against  
which  
estate he  
will prove

(1) Ex parte *Watson*, 2 Ves. & lately repealed by the 5 G. 4. B. 414. c. 114.

(2) Ex parte *Heaton*, Buck, 386.

(3) This restriction has been 399. Ex parte *Lee*, *ibid.* 400.

(4) Ex parte *Angerstein*, 1 Bro.

Election of proof.

Where a creditor has no notice of a dormant partner. Bond by mistake not made joint and several.

of a joint and several creditor; viz. where several obligors are jointly and severally bound, the obligee must either sue them all jointly, or each of them separately, — but he is not allowed to do both. (1) Where also the creditor has *no notice* that the bankrupt has a *dormant partner*, he may (as we have before seen (2)) make his election to come in, either as a joint or separate creditor. (3) So, where a creditor had a *joint bond* of two partners, which by *mistake* was omitted to be made *joint and several*, and there appeared to have been a clear intention of the parties that the liability should be *several*, as well as joint, — the creditor (under a joint commission issued against the parties) was permitted to prove the bond against the separate estate of either partner. (4) But, notwithstanding a creditor is thus put to his election — yet, after having done so, if the other estate should leave a surplus beyond the payment of its own debts he may then come in for a share of such surplus in right of such part of his debt as remains unsatisfied (5); though, after electing to go against the *joint estate*, he has no claim of preference to the other joint creditors upon the surplus of the *separate estate*. (6)

When the election must be made.

The creditor, before he elects, is entitled to a reasonable time (7) to examine into the accounts of the two estates. He also has, under particular circumstances, been permitted to prove against both estates, and defer his election till a dividend is declared (8); and even where he has received a dividend upon one estate, he has been allowed to change his proof upon refunding the dividend received. (9) But,

(1) 1 Saund. 153. n. 1. *ibid.* 291 e. Bac. Ab. Obligation, D. 4. Poph. 161. 2 Burr. 1290. 2 Vin. Ab. 68. pl. 7.

(2) Ante, 645.

(3) Ex parte Hodgkinson, 19 Ves. 294.

(4) In re Bate, 3 Ves. 400. In re Freeman, *ibid.* 401. note.

(5) Ex parte Rowlandson, 3 P. Wms. 405. Ex parte Parmenter, cit. 1 Atk. 99. Ex parte Banks,

1 Atk. 106. Ex parte Bond, *ibid.* 98. Ex parte Blankenhagen, 1 C. B. L. 249. Ex parte Hay, 15 Ves. 4. Ex parte Masson, 1 Rose, 159.

(6) Ex parte Bevan, 10 Ves. 107.

(7) Ex parte Butlin, 1 C. B. L. 250.

(8) 1 C. B. L. 250.

(9) Ex parte Rowlandson, 3 P. Wms. 409. Ex parte Bond, 1 Atk. 98. Ex parte Bentley, 2 Cox, 215. Ex parte Bolton, 2 Rose, 389.

In one case the late Vice-Chancellor held, that the creditor was bound to make his election before a dividend is declared of the estate against which he has already proved (1); but Lord Eldon, upon appeal, decided the contrary. (2) Though if a dividend has been made upon the other estate against which he seeks to prove, the Court will not permit that dividend to be disturbed by reason of such change of proof. (3)

*Election  
of proof.*

But, if the creditor has done any act in the character in which he has already proved, he will in general be considered to have made a conclusive election. As, where he had *signed the certificate* as a joint creditor, he was holden not entitled afterwards to alter his proof (4); and so, where he was a *party to a petition* in the character of a joint creditor, the late Vice-Chancellor appeared to think, that that was an objection to the transfer of proof. (5) Lord Eldon, however, held, upon appeal, that he was not concluded by this circumstance. (6) And where a debt was due to bankers on the balance of account, and part was covered by the joint promissory notes of the bankrupts, and the whole by a mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for payment of the whole balance, and part of the debt had been proved by the bankers against the joint estate, — it was held, that they were entitled to prove a portion of the residue against the separate estate of one of the bankrupts. (7) But where a joint and several creditor proved his debt under a separate commission against one of two partners, and received a dividend, and also signed his certificate — and afterwards brought a joint action against the solvent partner and the bankrupt — Lord Eldon held that the creditor, having made his election

When creditor concluded by proof already made.

(1) *Ex parte Husband*, 5 Mad. 421.

(2) *Ex parte Husband*, 2 G. & J. 4.

(3) *Ex parte Bidley*, 13 Ves. 70.

(4) *Ex parte Knott*, 1 Mont. Dig. 244.

(5) *Ex parte Husband*, *supra*.

(6) 2 G. & J. 4.

(7) *Ex parte Ladbroke*, 2 G. & J. 81.

Election  
of proof.

to proceed severally by proving the bond under the commission against the bankrupt, was not at liberty to bring a *joint action* upon it, but that he must proceed against the solvent partner separately. (1) Where, however, a joint creditor had sued out two separate commissions, under one of which he proved against the joint estate and received a dividend, being ignorant of his right to prove against the separate estate of the other, — he was held not to have conclusively elected to prove as a joint creditor; but that, upon refunding the dividend with interest, he might prove (2) as a separate creditor. And a joint and several creditor by bond, who proves against the separate estate of one of the obligors, is not concluded by taking afterwards an *additional joint security* from all the obligors, but is still entitled to elect. (3)

Excep-  
tions to  
the ge-  
neral rule  
of election.

There are some exceptions, however, to this rule of election so imposed on a creditor holding a joint and several security; which, indeed, are more particularly applicable to the holders of bills of exchange, and will require some attention to be properly understood.

Where  
parties on  
a bill are  
separate  
firms com-  
posing one  
general  
partner-  
ship.

*First*, Where there are *distinct firms*, and the holder is *ignorant* at the time he takes the bill, that they are all engaged in one general partnership: in this case, if any one firm draws upon another — whether the aggregate firm upon the minor firm, or *vice versa* — the holder, it has been settled, may prove against both estates, namely, the estate of the general partnership, as well as that of the minor firm (4), or the separately trading individual. And it has also been subsequently decided, that though the holder had *notice* of the joint interest of two different firms on a bill, who were engaged in a joint adventure, yet that he was entitled to prove the bill against both estates. (5)

(1) *Bradley v. Millar*, 1 Rose, 273.

(2) *Ex parte Bolton*, 2 Rose, 389. *Ex parte Swanzy*, Buck, 7.

(3) *Ex parte Hay*, 15 Ves. 4.

(4) *Ex parte La Forest*, 1 C.B.L. 251. *Ex parte Bonbonus*, *ibid.* *Ex*

*parte Benson*, *ibid.* *Ex parte Adair*, 2 Rose, 36.

(5) *Ex parte Walker*. *Ex parte Wenslay*, 1 Rose, 441.; and see Lord Eldon's observation, 8 Ves. 546.



*Secondly*, Where the parties on the bill are *not distinct firms* — that is to say, where no member of a partnership carries on trade on his separate account — and one of the partners draws upon the general firm, or the general firm upon the individual partner: — in this case, if the holder of the bill, at the time he took it, *had notice* that the different parties on it were included in one general partnership, (notwithstanding he procures the separate indorsement of one of the partners on the bill, for the express purpose of raising a contract for a double security) he cannot prove against both the joint and the separate estates, but is put to his election (1); because, as Lord Eldon has justly observed, where the object appears to be to give the bill a character of respectability by this distribution of the names of a partnership, a party to such an arrangement ought not to avail himself of it, against *his knowledge* of the method, in which the obligation of the firm ought regularly (2) to be created. If the holder is in perfect ignorance of the identity of the parties, and *bonâ fide* conceives them to be distinct houses of trade at the time he takes the bill, then it would seem consistent with the principle of the above decisions, that he should be allowed to prove against both estates. But in a late case, where A. and B. were in partnership, B. being a secret partner, and A. on the partnership account drew bills in his own name on B., — Lord Eldon held, that the holder of these bills (though he was ignorant of the partnership) was not entitled to prove them against the joint estate, and also against the separate estate of B.; but that he was only entitled to prove them against each of the *separate* estates. (3)

*Election of proof.*  
Where parties are not distinct firms, but only individual partners of one general partnership.

*Distinction as to whether the holder knew that fact or not.*

In some cases, where the creditor has a right of proof originally against both estates, he may forfeit such right by *his own laches*, or by his own deliberate election to come only against one. In one case where, after proving against

Where right to prove against both estates is forfeited.

(1) *Ex parte Bigg*, 2 Rose, 37.

(2) 2 Rose, 38.

*Ex parte Bank of England*, 2 Rose, 82.

(3) *Ex parte Husbands*, 2 G. & J. 4.

***Election  
of proof.***

By laches.  
By a deli-  
berate  
election.

the joint estate, the creditor laid by for some time without proving against the separate one, and acted as a joint creditor by joining in a petition with other joint creditors (1), the late Vice-Chancellor thought that he was concluded; but Lord Eldon, upon appeal, held the contrary. (2) But where A. held a bill drawn by C. and Co. upon B. (who was a member of that firm, as well as a third person who was an infant) — but A. was ignorant of these circumstances, — and separate commissions being taken out against B. and C. (the infancy of the other partner excluding a joint commission) — an order was made under each commission for keeping distinct accounts of the joint and separate estates, and A. proved his debt against the joint estate under each commission, and received dividends under each; — it was held, that as A. had modelled his proof, not as against the liability of the parties arising from the contract on the bill, but upon his right to include or exclude the resort to a dormant partner, he had made a deliberate and *conclusive* election to resort to the joint funds alone; and could not, in addition to the two proofs he had already made, prove also against the separate estate of B. (3)

Where  
joint cre-  
ditors,  
upon a dis-  
solution of  
partner-  
ship, have  
no election  
against the  
separate  
estate.

Where two partners dissolved their partnership, one continuing the business and covenanting to pay the joint debts — and afterwards a joint commission issued against them; — the joint creditors, who had not (previous to the bankruptcy) accepted the continuing partner as their sole debtor, were held not to have an election to prove against the separate estate of the continuing partner, but to have only a right to prove against the joint estate; notwithstanding what was the joint stock of the two, under the circum-

(1) *Ex parte Husband*, 5 Mad. 421. From the marginal abstract of this case, it would seem as if all that it decided was, that the creditor had simply a right of election; but the report of it expressly states, that there were *two distinct firms*, and that the creditor was *ignorant* of the general partnership.

(2) *Ex parte Husbands*, 2 G. & J. 4.

(3) *Ex parte Liddel*, 2 Rose, 34. For a very able and accurate examination of the cases relating to the doctrine of election, see Mr. Eden's *Treatise on the Bankrupt Law*, page 170. et seq.

stances of the case, became the separate estate of the continuing partner. (1)

Where A. sold goods to B., and other goods to C., and B. and C. joined in a note for the whole, A. was allowed to prove against the separate estate of each, on giving up the joint note. (2)

T. (who was in partnership with M. and F., and also carried on a separate trade) being indebted to K. 100*l.* on his separate account, sent him a bill of exchange for 300*l.*, that wanted two months of becoming due, indorsed by T. M. and F. (but not by T. in his individual character), and requested K. to give him credit for the 100*l.*, and to send him a bill for the remainder of the 300*l.* — K. accordingly gave him credit for the 100*l.*, and sent him a banker's check for 200*l.*, which was duly paid — the bill for 300*l.* was dishonoured, and T. M. and F. became bankrupts: — under these circumstances, Lord Eldon held that the transaction must be considered as an exchange of paper; and that K. had no right of election in his proof upon the bill, nor any right to prove for any part of the 300*l.* against the separate estate of T. (3)

*Election of proof.*

Joint makers of a promissory note.

Where the holder of a bill, though given by one partner for his separate debt, has no election against his separate estate.

Where a joint and separate creditor sues out a separate commission against one partner, and afterwards another creditor sues out a joint commission, the first commission will not be superseded in favour of the last, without securing all the rights of the joint and several creditor to prove under the joint commission, and elect between the joint and separate estates; and he will be allowed also to elect, out of which estate he will be paid the costs of superseding the first commission. (4)

A joint and separate creditor, who sues out a separate commission, which is superseded in favour of a joint one, not deprived of his election.

(1) *Ex parte Freeman*, Buck, 47. *Ex parte Fry*, 1 G. & J. 96.; and see *Ex parte Fell*, 10 Ves. 347. *Ex parte Williams*, ante, 566.

(2) *Ex parte Lobb*, C. B. L. 250.

(3) *Ex parte Kirby*, Buck, 511.

(4) *Ex parte Brown*. *Ex parte Munton*, 1 V. & B. 60. 1 Rose, 443. *Ex parte Smith*, 1 G. & J. 256.

## SECTION VII.

*Of Proof between Partners, and different Firms composing one general Partnership.*

A solvent partner cannot prove against his co-partner, in competition with the general creditors.

Although one partner may be a creditor of another, and may (under certain circumstances) enforce his claim against him both at law and in equity notwithstanding the partnership, yet in Bankruptcy it is now a settled rule, that a solvent partner cannot prove under a commission against his co-partner, so as to come in competition with the creditors of the partnership (1) — that is, that he has no right to receive any portion of his debt, until all the creditors of the partnership are paid 20s. in the pound, as well as all interest due upon their respective debts subsequent to the date of the commission. (2) The above rule is founded on this plain principle of reason and justice, viz. that a partner, who is himself liable to all the creditors of the partnership, ought not to take any of the funds, before all the creditors (to whom he is so liable) are duly paid. (3)

The same rule between the different estates when all the partners bankrupt.

And where all the partners become bankrupt, the same rule is adopted as to the proof between the different estates, though it is in this case frequently more difficult of application, and does not seem to be altogether founded upon quite so sound a principle. It appears, however, to be established by the modern decisions, that not only is the

(1) Ex parte *Burrel*, C. B. L. 532. Ex parte *Parker*, *ibid.* Ex parte *Pine*, *ibid.* Ex parte *Broome*, 1 Rose, 69.

(2) Ex parte *Reeve*, 9 Ves. 588.

(3) Though the partner cannot prove for the purpose of receiving dividends, he is, however, at liberty to enter a claim for the amount of his demand. Ex parte *Broome*, 1 Rose, 69. And it seems to be a question undetermined, whether, he has not strictly a right to prove,

with a reservation of his right to receive dividends until the taking of the partnership accounts — though the practice of the commissioners is not to permit such proof. The arguments in favour of the proof are, 1st. That the demand of the partner is an equitable debt; 2dly. That it is a debt within the 52d section of the new act; and, 3dly. That the partner would be barred by the certificate of his copartner. And see 1 Mont. Dig. 245.

separate estate of one partner prevented from claiming against the joint estate of the partnership in competition with the joint creditors (1), but that the joint estate, also, is not permitted to claim against the separate estate in competition with the separate creditors. (2)

*Proof  
between.*

The only exceptions to this general rule seem to be, *first*, where money or effects have been *fraudulently abstracted* from one estate and applied for the benefit of the other (3); and, *secondly*, where some of the members of a partnership form an entirely distinct firm, carrying on a *different trade* from that of the general partnership, and where the articles of one trade have been furnished by one firm to the other. (4)

*Exceptions to  
the rule.*

And *first*, where money or effects have been *fraudulently abstracted* from one estate to benefit the other.

*Money  
fraudulently  
abstracted.*

This question, it will be perceived, involves the consideration of innumerable transactions, each depending on its own peculiar circumstances; and the question will always be, whether or not, in the opinion of the Lord Chancellor, or of a jury, the transaction will be held to amount to a case of fraud. It has however been decided, that where one partner takes the property of the partnership fund, and applies it to his own use *without the knowledge* of the other partners, and to the prejudice of the partnership estate, this is such a case of fraud as falls within the exception to the rule; and that the assignees, on behalf of the joint creditors, may consequently prove the amount of the sum so abstracted against the separate estate. (5) The term *fraud*, indeed, (as Lord Eldon has observed) is used

*What is a  
case of  
fraud.*

(1) Lord Hardwicke, however, was of opinion, that if one of two bankrupt partners had lent money to the partnership, then that his separate creditors had a right to a dividend upon this, in common with the joint creditor. *Ex parte Hunter*, 1 Atk. 327. C. B. L. 534.

(2) *Ex parte Grill*, C. B. L. 534. This point, however, was decided

differently by Lord Talbot. *Ex parte Blake*, C. B. L. 533. *Ex parte Batson*, *ibid.* 534.

(3) *Ibid.* *Ex parte Lodge*, 1 Vea. jun. 166. *Ex parte Cust*, C. B. L. 535.

(4) *Ex parte Sillitoe*, 1 G. & J. 374.

(5) *Ex parte Cust*, *supra.* *Ex parte Lodge*, *supra.*

*Proof  
between.*

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Rights of  
separate  
creditors  
of defraud-  
ed part-  
ners.

in a sense to distinguish the transaction from a taking by contract or loan, or from a taking with the express or implied authority of the other partners. (1) And with respect to the principle of the above exception, he upon another occasion remarks, that it is against conscience that the creditors should resist the restoration of that, which the debtor (from whom they seek payment) has against the consent of his partners, and in fraud of their contract (2), taken out of the joint fund. In the event, too, of a surplus of the joint estate, then the separate creditors of the partner who has been defrauded will have a right to such surplus, in preference to the separate creditors of the partner committing the fraud. Thus, where it appeared that a debt had been proved against the joint estate, in respect of bills drawn by one partner in the name of the firm for his own separate debt, it was determined, that his share of the surplus of the joint estate was subject to the lien of the separate estate of the other partner, in preference to his own separate creditors; and not only so, but that if such surplus proved insufficient to satisfy the balance due from the one estate to the other, then that the separate creditors of such other partner might come in against the separate estate of the partner (so drawing the bills) for the deficiency. (3)

Solvency  
of a part-  
ner will  
not pre-  
vent the  
same right  
of proof.

The *solvency* of either of the partners, also, will not prevent the exercise of the same right of proof, as the joint creditors would have had if both had become bankrupts. Thus, where two solvent partners, after the bankruptcy of their copartner, were compelled to discharge a debt against the partnership (which he had created by his own fraud), and had also paid all the joint debts of the partnership, they were permitted to prove the amount of this debt under the commission against their bankrupt partner; Lord Eldon observing, that the solvent partners might

(1) 2 V. & B. 213.

(2) Ex parte Yonge, 3 V. & B.

(3) Ex parte King, 17 Ves. 115.

have filed a bill to compel the other to replace money so fraudulently obtained — that this right could not be taken from them by the bankruptcy of their copartner (1) — and that, in every fair and equitable understanding of the respective situations of the parties, the solvent partners were to be considered as the separate creditors of the bankrupt partner. And even at Law it has been held, that where a solvent partner had paid money to another before his bankruptcy, for the specific purpose of being paid over as his liquidated share of a debt to their joint creditor — and the money had been misapplied by the bankrupt partner, — the solvent partner could prove the amount under the commission. (2) So, where there happens to be a surplus of the joint estate under a *separate commission* — if, upon taking the partnership accounts, the bankrupt is found indebted to the solvent partners in respect of the transactions of the partnership, the solvent partners are also entitled to such surplus towards discharging such debt; and if it turns out insufficient, then they are at liberty to prove against the separate estate of the bankrupt partner for the difference. (3)

*Proof  
between.*

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But, notwithstanding one partner may abstract the partnership money without the privity or subsequent approbation of his copartner, yet if the latter, by his own conduct, enables him to do so — such as by conceding to him a full dominion over the funds contrary to the express provision of the articles of partnership — this is a case which does not come within the above exception. Thus, where the articles of partnership between two partners provided, that the money belonging to the concern should be lodged in the hands of a banker in *their joint names* — and one partner permitted the other to pay in the partnership monies, and draw them out from time to time in *his own separate name*, — Lord Eldon held this to be such an acquiescence of one

Where one partner by his own conduct gives the other a full control over the partnership funds.

(1) *Ex parte Young*, 2 Rose, 40.  
3 V. & B. 55.

(2) *Wright v. Hunter*, 1 East, 20.  
(3) *Ex parte Terrell*, Buck, 345.

*Proof  
between.*  
\_\_\_\_\_

What does  
not  
amount to  
an acqui-  
escence in  
such con-  
trol.

partner in what necessarily gave the other the whole control over the joint property, that he must abide by the consequence of his own conduct; and, therefore, though the money might have been taken by the other partner for his own purposes, without the privity or subsequent approbation of his copartner — yet the facts, by which the partner was so enabled to possess himself of it, being facts within the knowledge and approbation of the copartner, the consequence of those facts must also be taken to have been within his knowledge, and with his privity and approbation. (1) But where one partner was entrusted and empowered by the other, *pursuant to the articles of partnership*, to draw bills and manage the cash concerns of the copartnership; — this was held to be not such an acquiescence in his dominion over the partnership funds, as would prevent the above right of proof from attaching against his estate for a debt, which he had created against the partnership, by pledging the credit and using the notes and name of the partnership for his own purposes, without the consent of the other partners. (2) The right of proof also in this case was held by Lord Eldon to be sustainable on another ground, viz. under the provisions of the 49 G. 3. c. 121. s. 8., and consequently under those also contained in the 52d section of the new act. For he observed, that the solvent partners having paid all the joint debts, though they were not strictly sureties, were nevertheless in the situation of “*persons liable*,” and, as such; entitled to prove against the bankrupt partner. And this right of proof by a solvent partner, who has paid all the partnership debts, or indemnified the bankrupt’s estate against them, has also been recognized in several other cases. (3)

(1) Ex parte *Harris*, 1 Rose, 437. 2 V. & B. 210.; and see Ex parte *Smith*, 6 Mad. 2.

(2) Ex parte *Young*, 2 Rose, 40. 3 V. & B. 35.

(3) Ex parte *Ogiley*, 3 V. & B. 155. *Wood v. Dodgson*, 2 M. & S. 195. Ex parte *Watson*, Buck, 449. Ex parte *Taylor*, 2 Rose, 175. See also 9 Ves. 590. 2 V. & B. 212.



When joint creditors have, under an order on the ground of there being no joint property, proved against one or more of the separate estates exclusively of the rest, the estate so burthened is entitled to remuneration from the others. (1) And where bankrupts were bound jointly and severally to the crown, and the joint estate had paid beyond its due proportion, contribution was decreed between the joint and separate estates. (2)

*Proof between.*

As to contribution between estates.

Where a solvent partner pays all the joint debts, and proves against the separate estates of his bankrupt co-partners, for the respective sums each is bound to contribute, — it has been a question, whether, if the estate of one of the bankrupts is insufficient to pay 20s. in the pound, the solvent partner can come against the other bankrupt's estate for his proportion of that deficiency, besides the original contributory proportion already proved against his estate. It has been holden by the present Vice-Chancellor, that this cannot be done; but that the solvent partner can only prove for such sum, as *at the time of the bankruptcy* each partner was bound to pay or provide — on the principle, that proof is equivalent to payment, without regard to the amount of the dividend — and also that proof cannot thus be mounted upon proof. (3) Some doubts, however, have been entertained as to the correctness of this decision — Lord Eldon observing, with respect to proof being equivalent to payment, that that position has been frequently overruled. (4) And Mr. Eden appears to think, that the equitable principle applicable to cases of principal and surety was not sufficiently attended to in the above decision. (5) But it must be remembered, that though the solvent partner is in the nature of a surety to third persons for his co-partners, yet his co-partners are not respectively bound for *each other* as sureties to him — except, indeed, for

Where a solvent partner, who has paid all the joint debts, may prove for a share of the deficiency not paid by another bankrupt partner.

(1) Ex parte *Willock*, 2 Rose; 392. Ex parte *Wylie*, *ibid.* 393.

(2) *Rogers v. Mackenzie*, 4 Ves. 752.

(3) Ex parte *Watson*, Buck. 449. Ex parte *Smith*, *ibid.* 492.

(4) Ex parte *Hunter*, Buck. 556.

(5) Eden's B. L. 168.

*Proof  
between.*

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so much only as each may be bound to contribute, in *proportion to his own share* in the partnership, for any loss occasioned to the *general concern* by the default of another. With this exception, each partner is only liable to the others for his own acts and defaults, and not for the acts and defaults of any one of his co-partners. Accordingly, when there are more than two partners, then if one proves entirely insolvent, his share of the debts must be paid by the other partners, each bearing his due proportion of the loss occasioned by the insolvency of their co-partner. On the other hand, if two of three partners become bankrupt, and one of the estates of the bankrupt partners pays but a small dividend on the amount of his contributory share due to the solvent partner, the latter ought not to prove for the whole of the deficiency against the estate of the other bankrupt partner, but only for so much as that other bankrupt partner would have to contribute towards making good such deficiency, if he had continued solvent; otherwise, indeed, the estate of the bankrupt partner would be charged with a most unreasonable burthen for the indemnity of the solvent partner: (1)

Where  
some of  
the part-

*Secondly.* Where some of the members of a partnership form an entirely distinct firm, carrying on a *different trade*

(1) The proposition contended for by the counsel for the petition in *ex parte Watson*, (*supra*) viz. "that if one partner pay more than his share of the partnership debts, he may recover the *amount* so paid, against *any one* of the other members of the firm," is, certainly, quite untenable. As, suppose three partners interested in equal shares, two of whom become bankrupt, and the solvent partner pays the whole of the joint debts, amounting to 1500*l.* He comes for contribution against both the bankrupt partners, and proves against the estate of each a debt of 500*l.* One of the bankrupts pays only a

dividend of 1*s.* in the pound, upon which the solvent partner applies to prove the deficiency, viz. 475*l.*, against the estate of the other bankrupt partner. If he is permitted to do so, and that bankrupt partner pays 20*s.* in the pound, the solvent partner will by that means receive from one of his copartners the whole of the loss occasioned by the default of the other, without having contributed one farthing himself; a consequence so manifestly absurd, as induces one to suppose there must be some inaccuracy in the report of the argument in the case above referred to,

from that of the general partnership, and where the articles of *one trade* have been furnished by one firm to the other.

*Proof between.*

In this case there are several points of distinction, which it will be of importance to attend to. In the first place, the *trades* must be *wholly distinct and different from each other*, and not merely branches of the joint concern. For, if there be in reality only one partnership, arranging different concerns belonging to them all in different ways for the benefit of the whole joint concern, there cannot in this case be proof by part against the other part. Thus, where three partners carried on the business of cotton manufacturers in Lancashire, and two of them had a branch establishment in London, — it was held, that there could not be proof by the estate of the three against that of the two. But if the trades had been perfectly *distinct*, such as those of *cotton manufacturers* and *ironmongers*, then the three might have been creditors upon the separate concern of the two. (1) So, where A. and B. were partners as insurance-brokers, and A. carried on a separate trade as an oilman, in the progress of which he became indebted to the firm, — the assignees of the joint estate were admitted as creditors upon the separate estate. (2)

ners carry on a different trade under a distinct firm.

In the next place, though a joint trade may prove against a separate trade, yet it has been held that *one of two partners*, though carrying on a separate trade, and furnishing goods as a separate trader to the partnership, cannot prove under a commission against his co-partner; that is, not before all the joint creditors are paid the whole of the principal and interest on their respective debts. For in none of the cases (as Lord Eldon has observed) in which the partner, constituting a distinct house, has ever been admitted to prove, has the estate (against which he has been so admitted) been liable

One of two partners cannot prove against the other.

(1) In re *Shakeshaft*, C. B. L. 538. Ex parte *Hargreaves*, 1 Cox, 440. Per Lord Eldon, 11 Ves. 414. Ex parte *Ring*, C. B. L. 538. Ex parte *Freeman*, *ibid.* Ex parte *Johns*, *ibid.* Ex parte *Heskam*, 1 Rose, 146. (2) Ex parte *St. Barbe*, 11 Ves. 413.

*Proof  
between.*

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Consider-  
ation of  
the debt  
must be  
for articles  
of trade.

with that distinct house for joint debts; — the principle being, that a solvent partner shall not be admitted to prove in competition with creditors who have a demand against himself. (1)

*Lastly*, the consideration for the debt must be for goods sold, that is, for *articles of one trade* furnished to the other trade, and *not for money* advanced by one of the firms to the other. Therefore, where the debt accrued from the aggregate firm to the separate trade, in respect of monies provided for the aggregate firm on the credit of the indorsement of the separate firm — Lord Eldon held, that in this case no proof could be made by the separate firm against the aggregate one (2), as this could not be considered a transaction between trade and trade. But in a recent case, where the question was, whether a partner in a *banking house* could prove a debt against the estate of another banking firm (in which he was also a partner) for *money lent*, the Vice-Chancellor decided, that he was entitled to prove his demand, looking upon the case of a *banker* lending money, as that of a trader making advances *in the way of his trade*. (3)

As to or-  
der for  
keeping  
distinct  
accounts.

Where there were three firms commencing at different periods, — upon the bankruptcy of the firm in which they were all engaged, distinct accounts were ordered to be kept of the different partnerships, as well as of the respective separate estates of each individual bankrupt. (4) But, where there have been various partnerships, and a joint

(1) *Ex parte Adams*, 1 Rose, 305. In a recent decision, however, of the Vice-Chancellor, he said he was at a loss to see the ground of distinguishing between a case, where there were only *two* partners, and one where there were more. *Ex parte Brenchley*, *Sittings after Trinity Term*, 1826.

(2) *Ex parte Sillitoe*, 1 G. & J. 374.

(3) *Ex parte Brenchley*, *supra*. In this case his Honour professed that he could not understand some of the principles on which the decision in *ex parte Sillitoe* was founded; and that he saw no reason why any difference should be made in the proof of a debt, whether it was created by a loan of money, or by a transaction in the way of trade.

(4) *Ex parte Martin*, 2 Bro. 15.

commission is taken out against one firm, in which some of the parties were not engaged, there can only be the common order for keeping distinct accounts of the joint and separate estates. (1) *Proof between.*

(1) *Ex parte Parker*, 1 C. B. L. 249.

## CHAP. XVI.

### OF RELATION TO THE ACT OF BANKRUPTCY.

- SECT. 1. *As to Payments made by or to the Bankrupt.*  
 2. *As to Purchasers.*  
 3. *As to other Dispositions of the Bankrupt's Property.*  
 4. *As to Judgments, Executions, and Attachments.*  
 5. *As to Notice of an Act of Bankruptcy.*
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#### SECTION I.

##### *As to Payments made by or to the Bankrupt.*

THE alterations made by the new statute in the law of relation to the act of bankruptcy, by which all dispositions subsequently made of the bankrupt's property were (under the 13 Eliz. c. 7.) avoided and overreached, have now rendered much of the doctrine, which formerly appertained to this division of the bankrupt law, unimportant for consideration. It may suffice to observe, that after the hardship of the former enactment had been relaxed by many subsequent statutes (1), it was still sufficiently oppressive to be designated by Judges from the bench (2) as an *odious law*; — and it was also one which they always refused to let a party take advantage of *upon motion*. The new statute will be found to have relaxed the law of relation still further; but whether such relaxation has gone far

(1) 1 Jac. 1. c. 15. s. 14. 19 G. 2. c. 52. s. 1.

(2) *Clarke v. Ryall*, 1 Bl. 642.; and see 4 Taunt. 198. Per Mansfield C. J.

enough remains to be considered, and will more especially depend upon what construction courts of justice will give to its enactments. These it may be convenient to discuss in the order above mentioned; and, instead of enumerating in the gross the various alterations in this branch of the law, it will be better, perhaps, to point them out singly to the reader, as they occur in the progress of the inquiry, — by which means it will be more clearly perceived in what respects the new law differs from the old.

*Payments  
by the  
bankrupt.*  
—

By section 82. of the new statute all payments really and *bonâ fide* made by the bankrupt, or any person on his behalf, before the date and issuing of the commission to any creditor (such payment not being a fraudulent preference of such creditor), are declared to be valid, notwithstanding any prior act of bankruptcy — as well as all payments in like manner made to the bankrupt. And such creditor will not be liable to refund the same to the assignees, provided the person so dealing with the bankrupt had not (at the time of the payment by or to the bankrupt) notice of any act of bankruptcy by such bankrupt committed.

All pay-  
ments  
made *bonâ  
fide* with-  
out notice  
of an act  
of bank-  
ruptcy,  
valid.

This relation to the act of bankruptcy cannot, of course, be carried further back than the accruing of the petitioning creditor's debt; for the assignees could not avail themselves of any act of bankruptcy *beyond that time*, without destroying their title as assignees. (1)

Relation  
only ex-  
tends to  
accruing of  
petitioning  
creditor's  
debt.

The payment by the bankrupt to a creditor is not confined now to a payment "in respect of *goods sold*, or of a *bill of exchange*, in the usual and ordinary course of trade," (as was formerly held under the 19 G. 2. c. 32.) in order to be protected (2); — for those words (which were inserted in that act) are purposely omitted in the above section,

Payment  
not con-  
fined to  
former  
restriction;

(1) *Ex parte Birkett*, 2 Rose, 71. *Harwood v. Lomas*, 11 East, 127.  
*Ex parte Bowness*, 2 M. & S. 479. *Bayly v. Schofield*, 2 M. & S. 538.  
 (2) *Bradley v. Clark*, 5 T.R. 197. *Ex parte Congalton*, 3 Bro. 47.  
*Vernon v. Hall*, 2 T.R. 648. *Pin- Tamplin v. Diggins*, 2 Camp. 312.  
*kerton v. Marshall*, 2 H. B. 334. *Blogg v. Phillips*, *ibid.* 129.

**Payments  
by the  
bankrupt.**

but must  
be a *bonâ fide* pay-  
ment,

and made  
by the  
bankrupt,  
or his  
agent.

Indorse-  
ment and  
acceptance  
of bills of  
exchange.

Bartering  
goods.

which extends to all *bonâ fide* payments whatever. It must still, however, be *strictly* a *bonâ fide* payment; and therefore a payment in any mercantile dealings, which is not in the ordinary course of trade, would not even now be considered a payment *bonâ fide* — such, for instance, as a payment made for goods *before they are delivered* (1) — or, perhaps, a payment by weekly instalments for goods previously sold and delivered to the bankrupt. (2)

The payment, also, which is contemplated by the act, must be a payment by the *bankrupt himself*, or his *authorized agent*. Therefore, a payment made by a *third person* without the knowledge of the bankrupt — or a payment extorted by compulsion of legal process (by foreign attachment, for example, even after judgment) from a *third person*, who happened to have effects of the bankrupt in his hands at the time — cannot be said to be a payment *by the bankrupt*, or by a person on his behalf, when the bankrupt was not even conscious that his property was in the hands of such third person. (3)

The indorsement and delivery of *bills of exchange* by the bankrupt to a creditor after a secret act of bankruptcy, where the creditor received the money due on the bills before the commission issued, was held by Lord Hardwicke to be a *good payment* within the statutes of 1 Jac. 1. c. 15. and 19 G. 2. c. 32. — on the ground, that there was no difference between an actual payment of money in satisfaction of a debt, and indorsing bills of exchange (provided the money was received on them before the commission issued), — such indorsement being only a *medium* of payment. (4) So, the acceptance of a bill (which is afterwards duly paid) is equivalent to a payment of the debt in money at the time (5) of the acceptance. And the giving goods in ex-

(1) Per Bayley J. 3 B. & C. 416.

(2) *Bolton v. Jager*, 1 Ryan & 550.

M. 265.

(3) *Hovil v. Browning*, 7 East, 154.

(4) *Hawkins v. Penfold*, 2 Ves.

(5) Per Abbott C. J. *Somerville v. Brooks*, 4 B. & A. 525.



change for other goods was also held by Lord Kenyon to be a (1) good payment.

*Payments  
by the  
bankrupt.*

The *bankers* of a bankrupt are in the same situation in regard to him, as other persons are in this respect; and if they receive money from him after notice of an act of bankruptcy, they are bound to retain it for the use of the assignees. Any payments, therefore, made by them upon account of drafts drawn by the bankrupt, after they have had notice of an act of bankruptcy — or any payments of money over to the bankrupt himself — will not be protected. Neither can they set off any payment so made, or be allowed to come in as creditors in respect of it under the commission. (2)

*Payments  
by bankers  
after no-  
tice of an  
act of  
bankrupt-  
cy.*

Where a bankrupt shortly before his bankruptcy drew a bill which he procured to be discounted, and then gave his creditor an order to receive the amount, directing the person who discounted the bill to transmit it to the creditor — and whilst the money was in the hands of the carrier, committed an act of bankruptcy; — it was held, that the creditor (to whose hands the money did not come until after the act of bankruptcy) was liable to refund it to the assignees; for, whilst the money remained in the hands of the carrier, the property in it remained unaltered (3), notwithstanding the order to receive it was given to the creditor before the bankruptcy. Though this point would be ruled differently now, with respect to the relation to the *act of bankruptcy*, — yet the principle of the decision will apply to a case, where a creditor receives money under similar circumstances *after the issuing of the commission*.

*Money in  
the hands  
of a car-  
rier.*

A payment of a debt by the bankrupt upon being arrested (4), or threatened with an immediate arrest (5), is a *bonâ fide* payment within the statute, notwithstanding a secret act of bankruptcy. But, where a trader upon being

*Payment  
from fear  
of arrest:*

(1) *Wilkins v. Casey*, 7 T. R. 713.

(3) *Hervey v. Liddiard*, 1 Star. 128.

(2) *Vernon v. Hankey*, 2 T. R. 113. 3 Bro. 313. *Hammersley v. Purling*, 3 Ves. 757.

(4) *Cor v. Morgan*, 2 B. & P. 398. *Holmes v. Winnington*, cit. *ibid*.

(5) *Jones v. Lingard*, cit. *ibid*.

*Payments  
by the  
bankrupt.*  
———

Repay-  
ment of  
money  
clothed  
with a  
trust.

Payment  
to avoid a  
distress.

Payment  
in consi-  
deration  
of sur-  
render of  
lien.

arrested and afterwards charged at the suit of several persons, sent for all the creditors at whose suits he was detained *except one* — and paid those creditors alone the full amount of their debts — such payments were not considered to be *bond fide*. (1) And where a trader was arrested upon a *ca. sa.* after he had committed an act of bankruptcy — and thereupon placed goods in the hands of the sheriffs' officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the party, at whose suit the bankrupt had been arrested; — this transaction was considered also to be not a *bond fide* payment. (2) But where a party advanced money to a bankrupt during his imprisonment, for the express purpose of enabling him to settle with his creditors — and (that purpose failing) a part of the money was repaid to him by the bankrupt; — in this case, the money was held to be clothed with a specific trust, which prevented it from passing to the assignees; and consequently the repayment was protected. (3)

A payment by a tenant to a landlord to avoid a distress is a *bond fide* payment, even though the landlord knew of an act of bankruptcy; for, having by law a right of distress, if he thinks fit to waive that right and accept of the rent, he is not to be placed in a worse situation than if he had made an actual distress. (4) And though there are no goods on the premises, such a payment by the tenant will be valid; as the landlord would have a right to distrain on any goods which might be subsequently placed there. (5)

A payment made by the bankrupt to a party who had a *lien* on papers in his hands for a balance due, which he delivered up on payment of such balance, was held to be a *bond fide* payment; — though the party did not expressly stipulate for payment as a condition for the surrender of

(1) *Southey v. Butler*, 3 B. & P. 237.

(2) *Allanson v. Atkinson*, 1 M. & S. 583.

(3) *Coles v. Robins*, 3 Camp. 185.

(4) *Stevenson v. Wood*, 5 Esp. 200.

(5) *Mavor v. Croome*, 1 Bing. 261.

the lien — and even though the party received such payment from the bankrupt in the King's Bench prison, where he was actually confined at the time — and the *lying in prison* was itself the act of bankruptcy on which the commission issued. (1)

*Payments  
BY the  
bankrupt.*

Where a bankrupt, previous to an act of bankruptcy, gave a power of attorney to his creditor to receive sums of money due to the bankrupt, and to apply them to the creditor's own use, — any money received under such power by the creditor *after the bankruptcy* was held to be recoverable by the assignees. (2)

*Money re-  
ceived af-  
ter bank-  
ruptcy  
under a  
power of  
attorney.*

The relation to the act of bankruptcy, it seems, only affects payments and transactions by the bankrupt, which may operate to the prejudice of the assignees, or interfere in any manner with their rights; for in other respects the act of a man, who has committed an act of bankruptcy, has the same effect as the act of any other person. (3) Therefore where a bankrupt, having securities in his bankers' hands to a certain amount, drew upon them a bill for a *larger amount*, on the score of his accommodation — which (after acceptance, and after an act of bankruptcy) he indorsed to a third person; — it was held, that the indorsee, though not entitled to recover against the bankers the whole amount of the bill — which would have prejudiced the right of the assignees to the amount of the securities held in the bankers' hands — might nevertheless recover to the extent of the difference between the amount of such securities and the amount of the bill. (4)

*Relation  
only affects  
payments  
which may  
prejudice  
the assign-  
ees.*

With respect to payments to a bankrupt — it is provided by section 84. (5) of the new statute, (in addition to the 82d section above mentioned) that no person or body cor-

(1) *Thompson v. Beatson*, 1 Bing. 145.; but see post, 682.

(2) *Hovill v. Lethwaite*, 5 Esp. 158.

(3) Per Lord Ellenborough, 12 East, 659.

(4) *Willis v. Freeman*, 12 East, 656.

(5) This section is taken from the 56 G. 3. c. 137. s. 1.

*Payments to the bankrupt.*  
 ———

porate, or public company having in his or their possession or custody any money, goods, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order, provided such person or company had not notice that such bankrupt had committed an act of bankruptcy.

Distinction between payments *by*, and payments *to*, the bankrupt.

Payments made *to* a bankrupt after a *secret* act of bankruptcy depend, for their validity, upon the same principle as payments made *by* him; they must be equally *bonâ fide*, and in discharge of a debt or other legal liability. But there is a great distinction in reality between the effect (as it relates to the general creditors) of the invalidity of a payment *by*, and of a payment *to*, a bankrupt; that is, between a creditor losing the benefit of a receipt of money, and being subjected to make a payment twice over. In the case of a payment *to* the bankrupt—that payment must, unless there be great misconduct on the part of the bankrupt, enure (by an increase *pro tanto* of the distributable fund) to the benefit of those very creditors, who claim the second payment of the same debt; whereas a receipt *from a bankrupt* operates *pro tanto* in diminution of the distributable fund—and, so far as it extends, defeats the general object of the law, viz. an equal division among all the creditors. (1) Accordingly, where a party bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bonâ fide* without knowledge of the act, such a payment was held to be protected. (2) But the contrary has been subsequently held, with respect to a payment made by a party who was *not actually indebted* to the bankrupt at the time, notwithstanding it was made in *anticipation* of a consignment of goods, which had been previously ordered of the bankrupt by the person making such payment. (3) As the Court, however, decided this last case upon the ground, that the defendant (when he made the

Payment without knowledge of act of bankruptcy. Payment made in anticipation of a consignment.

(1) Per Abbott C. J. 4 B. & C. 531.

(2) *Cash v. Young*, 2 B. & C. 413.

(3) *Bishop v. Cramsey*, 3 B. & C. 415.

payment) was *not* “*a debtor of the bankrupt*” within the 1 Jac. 1. c. 15. s. 14. — and as those words are omitted in the 82d section of the new statute, which extends generally to *all payments* really and *bonâ fide* made before the date of the commission — it is probable, when a case of this kind comes again before the Court, it would meet with a different decision.

*Payments to the bankrupt.*  
—

Where money was paid to a bankrupt by a party, who had received it from the bankrupt's debtor, to convey to the bankrupt in the character merely of a *messenger or bearer*, — such a payment, it was held, could not be disputed by the assignees, as against such messenger or bearer, though he was aware that the bankrupt was in prison at the time. (1)

*Payment by a messenger.*

Where a factor gave his acceptance after a secret act of bankruptcy of his principal (of which he had then *no notice*) for the amount of goods sold by him for his principal, — though the factor *paid* the acceptance to a third person *after notice* of the act of bankruptcy, the payment was held to be protected; as it was to be considered a payment in reference to the *giving* of the bill, and not in reference to the time when it became *due*. (2) And the same point was lately ruled at *Nisi Prius* (3) before Lord Chief Justice Best. But, where the factor had *not sold the goods*, but had accepted and paid bills in respect of them after a secret act of bankruptcy of the principal, — in this case, the payment was held to be not a *payment* of an antecedent debt, but an advance of money — and therefore not protected, so as to prevent the assignees (4) from recovering the goods in trover from the factor.

*Payment of acceptance (in the hands of a third person) relates to the time when given, and not to the time when paid.*

*Factor.*

The act of bankruptcy by *lying in prison* (as we have before seen) (5) was under the former law held to relate back to the day of the first arrest — or day of surrender in discharge of the bail — and to operate as if the arrest, or

*As to payments to a bankrupt when in prison.*

(1) *Coles v. Wright*, 4 Taunt. 198.

(3) *Bennett v. Spackman*, 1 Carr. N. P. 274.

(2) *Wilkins v. Casey*, 7 T. R. 712.

(4) *Copeland v. Stein*, 8 T. R. 199.

(5) See ante, page 79.

*Payments  
to the  
bankrupt.*  
—

or surrender, was in itself a *complete* act of bankruptcy. Consequently, where a payment was made to a trader in prison, with full notice of that fact — and with notice also from an attorney, that a commission would shortly be issued, and that the act of bankruptcy would relate back to the day of the imprisonment — and the requisite time to constitute an act of bankruptcy was afterwards completed, — such a payment was held to be (1) not protected. But where the payment was made to an agent of the bankrupt, *without any knowledge* of the bankrupt being in prison, — in this case the payment was considered valid; though Lord Ellenborough observed, that if the party had *known the fact*, out of which the bankruptcy sprung, this would have deprived him of the protection of the statute. Yet we have seen (2), that a payment *by* a bankrupt to a creditor was held good, though the creditor actually received the money from the bankrupt in the very prison where he was confined. And, indeed, it seems somewhat doubtful, for the reasons before stated in treating of this particular act of bankruptcy, whether it will now be held to relate back to the *first day* of the imprisonment. (3) The same doctrine, however, as to the fraction of a day (which applies to other acts of bankruptcy) applies also to this; and accordingly where the sheriff took possession under an execution, and at a later hour of the same day on which the bankrupt surrendered in discharge of his bail, the execution was holden valid. (4) For the *very hour* of the day when a fact took place (as to all purposes connected with a right of property) may be properly inquired into; though the parties are entitled to take the *whole day* into account, in calculating the period of the imprisonment, with a view to the (5) act of bankruptcy.

As to frac-  
tion of a  
day.

(1) *King v. Leith*, 2 T. R. 141.

(2) *Ante*, 679.

(3) See *ante*, page 79.

(4) *Thomas v. Desanges*, 2 B. & A. 586.

(5) Per Abbott C. J. *Saunderson*

*v. Gregg*, 3 Star. 72.; and see *Sadler v. Leigh*, 4 Camp. 195. *Wydown's case*, 14 Ves. 87. *Glassington v. Rawlins*, 3 East, 407. *Ex parte Birkett*, 2 Rose, 71.

When the act of bankruptcy consists in *escaping out of prison, or custody*, it is then expressly declared, by the *fifth section* of the new statute, to relate back to the time of the arrest, commitment, or detention.

*Payments  
to the  
bankrupt.*

A payment made to the bankrupt by *coercion at law*, before the execution of the commissioner's assignment, even with notice of an act of bankruptcy, has been always considered valid, unless fraud or collusion can be shewn between the debtor and the bankrupt. (1) And it is no defence against an action by the bankrupt, that he has committed an act of bankruptcy of which the defendant has notice, if no commission be actually sued out, nor any proceeding be instituted for that purpose. (2) But it has been held, that a debtor of a bankrupt was not warranted in paying funds of the bankrupt's to a creditor (who sued the bankrupt in the mayor's court) upon an *attachment merely* against the debtor as garnishee, — for that he was not justified in paying over the money, *before judgment* had been obtained against him. (3) And even in a case where *judgment*

*Payment  
by coer-  
cion of  
law.*

*Foreign  
attach-  
ment.*

(1) *Pryn v. Beale*, 3 Keb. 230. *Andrews v. Spicer*, *ibid.* 616. *Foster v. Allanson*, 2 T.R. 479.

(2) *Ibid.* *Prickett v. Down*, 3 Camp. 131.

(3) *Windham v. Paterson*, 1 Star. 147.; and see *Barker v. Goodair*, 11 Ves. 78. Sir Wm. Evans has made some very just and forcible observations on these decisions, in his note to the statute 1 Jac. 1. c. 15. s. 14. and in his Letter to Sir S. Romilly (page 204.) "It is impossible," he says, "to conceive a greater anomaly or absurdity, than the law in this respect exhibits. In every other case, an action founded upon contract supposes the *actual breach of a previous obligation*, which it was incumbent on the defendant to perform; but in this case the action itself is rendered necessary, in order to render the party secure in the per-

*formance of his duty.* From the expressions, too, thrown out in some of the cases, it would seem not sufficient for the defendant to express his readiness to make the payment demanded, but to require that, for his indemnity, an action should be *prosecuted to judgment*. As a payment *before judgment* might, therefore, be treated as collusive, perhaps a judgment by *default*, or *confession*, would not be regarded in a much more favourable light. And thus a party, perfectly willing to perform an engagement which can be legally enforced, is, without any default of his own, and from collateral circumstances which he has nothing to do with, subjected to the expense and inconvenience of a legal process, attended possibly with arrest and imprisonment, before he can satisfy with safety the claims

*Payments  
to the  
bankrupt.*

As to bill  
of inter-  
pleader.

Payment  
under a  
commis-  
sion which  
is super-  
seded.

was obtained against the garnishee, and he had paid over the money to the creditor, the creditor was held bound to refund to the assignees. (1) Where a banker, however, who had in his hands a balance due to an insolvent trader, was served with different attachments by his creditors, and then held to bail in trover by the trader himself, — it was held, that he was entitled to relief in equity on a bill of interpleader. (2) But it seems the better plan in such a case would have been, to pay the money into court in the action, which would have operated as a discharge at law, and would have prevented the necessity of a bill of interpleader. (3)

Where a debtor paid the amount of the debt to assignees under a commission, which was afterwards superseded — and the same assignees were appointed under the second commission, — the payment was held to be protected under the 46 G. 3. c. 135. s. 1., by the relation of the rights of the assignees, which were revested in them by the second commission, and which the defendant believed to exist when the payment was made. (4)

“ which he is totally unable to re-  
“ sist. In common cases of con-  
“ flicting claims, a person, who is  
“ willing to satisfy his obligation  
“ according to the right, may be  
“ released from becoming a party  
“ to a contest in which he has no  
“ concern, by means of a bill of  
“ interpleader; but in the case  
“ under consideration” — (which  
was not a proceeding by foreign at-  
tachment) — “ there can be no such  
“ assistance; for the claim is all on  
“ one side, and there is no com-  
“ petitor who can be brought  
“ before the Court.” In order to  
apply the proper remedy to such a  
defective state of the law, he sug-

gests, that all payments, *although  
after knowledge of an act of bank-  
ruptcy committed*, should be pro-  
tected if made *before a commission  
has actually issued*, unless the com-  
mission should be taken out within  
so short a period after the act of  
bankruptcy, as might be productive  
of a mere race between the com-  
mission and the payment.

(1) *Hovil v. Browning*, 7 East,  
154.; and see ante, 676.

(2) *Langston v. Boylston*, 2 Ves.  
jun. 101.

(3) *Ibid.*

(4) *Davenport v. Carter*, 5 Moore,  
16.



## SECTION II.

*As to Purchasers.*

By *section 81.*(1) of the new act, all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the person dealing with the bankrupt had not at the time notice of any prior act of bankruptcy (2) by him committed. Provided also, that where a commission has been superseded, if any other commission shall issue against the bankrupt within two calendar months after it shall have been superseded, no such conveyance, &c. shall be valid, unless made or executed more than two calendar months before the issuing of the first commission.

Contracts two months before commission, though after act of bankruptcy, unimpeachable without notice.

This last proviso in the above section was introduced to remedy a mischief, which, it seems, had crept into the bankrupt law since Sir *S. Romilly's* act. It frequently happened that creditors, in order to avail themselves of a fraudulent preference, and prevent being called upon to refund — (which they would be obliged to do by the issuing of a valid commission within two months) — resorted to the device of procuring a friend to sue out an *invalid commission*, and keep it alive until the *two months elapsed*, — and then, when a new commission issued after the first was superseded, they could thus bid defiance to the claims of the assignees.

As to proviso in case a first commission is superseded and a second issues.

In considering the above section, it is proposed in the first place to inquire more especially how it operates with

(1) This section, with the exception of the last proviso contained in it, is taken from the 46 G. 3. c. 135. s. 1. and 49 G. 3. c. 121. s. 2.

(2) In the former acts, the notice was extended to *insolvency* and *stoppage of payment*.

*As to purchasers.*

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regard to *purchasers*, though we may perceive it applies to all dealings and transactions generally with the bankrupt. It will be also material to distinguish between purchasers *without notice* of an act of bankruptcy, and purchasers *with notice* of such act.

*As to purchase of goods without notice, paid for in the ordinary course of trade.*

And, first, as to purchasers *without notice*. Although a purchaser without notice of any prior act of bankruptcy is only protected (according to the strict construction of the above enactment) when the purchase is made more than two calendar months before the date and issuing of the commission; — yet, for the benefit of trade, when *goods or articles of merchandise* are *bonâ fide* bought of a trader, though less than two months before the issuing of a commission against him, and after he had committed an act of bankruptcy — if the goods are paid for in the ordinary course of trade, without knowledge of the bankruptcy, such a purchase cannot be impeached by the assignees. To hold the contrary, indeed, would (as observed by Lord Chief Justice Abbott) be productive of most serious mischief; as it would have the effect of making every person buying any article in a shop in the city of Westminster, or elsewhere not in market overt, and paying for it immediately, liable to pay a second time. (1) When, however, the goods have *not been paid for*, but purchased (for example) on a contract of sale or return (2) — or where a bill is even accepted for a larger sum than the price of the goods, without any express appropriation of the bill to the payment of the price; — then, notwithstanding the goods are delivered to the purchaser, the assignees may recover them in trover, when they are purchased subsequent to an act of bankruptcy. (3)

*When goods are not paid for.*

(1) *Cash v. Young*, 2 B. & C. 413. *Contra*, *Saunderson v. Gregg*, 3 Star. 72.

(2) *Hurst v. Gwennap*, 2 Star. 306. The decision in this case is not very reconcilable with the facts

as stated in it, as there appears to have been strong evidence of the *affirmance* of the sale by the assignees.

(3) *Bishop v. Crawley*, 5 B. & C. 415.

And in a purchase, either of real or personal property, made for a fair and valuable consideration without notice of an act of bankruptcy, — if the purchaser can defend himself at law, a court of equity will not favour assignees in their attempts to avoid the purchase, by enabling them to take advantage of the relation to the act of bankruptcy. (1) Upon a bill for a discovery, therefore, the Court of Chancery will not compel the purchaser to show *the time* of the purchase, for fear it should be overreached, and be within the time after an act of bankruptcy committed. (2) So, also, the Court has refused to compel a man to discover *what goods* he bought of a bankrupt *after the bankruptcy* and before the commission sued out, where the party had no notice of the act of bankruptcy (3); though the Court will compel a disclosure of the *consideration* of a purchase. (4)

*As to purchasers.*

Equity will not favour claims of assignees against a fair purchaser without notice.

And though a purchaser without notice has *not* a prior *legal* estate in him, but only a better title, or a better right to call for the legal estate, than the assignees, a court of equity will not in this case assist them to avoid the purchase. (5) Where a purchaser, also, had even been guilty of misconduct in making a purchase, by giving much less than the value of the premises, for the purpose of defeating the creditors of the vendor, Lord Hardwicke permitted the purchase deed to stand as a security for the money really and *bonâ fide* advanced. (6) And an equitable purchaser is as much within the protection of the statute, as a purchaser by an actual conveyance at law. (7)

With respect to purchasers and other parties *with notice* of an act of bankruptcy — it has lately been decided, that where a party, to whom the bankrupt had released a

*As to purchasers with notice.*

(1) 1 Vern. 27.

(2) Anon. Skin. 149.

(3) *Brown v. Williams*, 2 Ch. Ca. 599.  
135. Anon. *ibid.* 136. *Wagstaff v. Reed*, *ibid.* 156. *Fisher v. Touchett*, 1 Eden, 158. *Abery v. Williams*, 1 Vern. 27.

(4) Skin. 149.

(5) *Wilks v. Bodington*, 2 Vern.

(6) *Barwell v. Ward*, 1 Atk. 260.

(7) *Read v. Ward*, 7 Vin. 119.

*As to purchasers.*

debt after the act of bankruptcy, knew that the bankrupt was insolvent (1), the release was invalid, although it was executed *more than two months* before the commission issued. (2) And the assignees, in an action against such party, need not aver in pleading, that the defendant knew of the act of bankruptcy when he took the release; but it is sufficient at the trial to prove, that he had such notice. (3)

Purchases with notice good, unless commission sued out within twelve months.

But by *section 86.* of the new statute, it is declared that no purchase from any bankrupt *bonâ fide* and for valuable consideration, though the purchaser *had notice* at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after *such* act of bankruptcy.

This provision is an extension of the relief afforded by the 21 Jac. 1. c. 19. s. 14., under which no purchase could be impeached after the expiration of five years; but in the construction of which statute it was holden, nevertheless, that no purchaser whatever was protected who *had notice*.

The twelve months to be reckoned from the act of bankruptcy, of which the purchaser had notice.

In order to impeach a purchase *with notice* of an act of bankruptcy, the commission must be sued out within twelve calendar months after *THE act* of bankruptcy, of which the purchaser *had notice*; for the statute is express in restricting the period to twelve months after *such* act of bankruptcy. Its being sued out, therefore, within twelve months of any *other* act of bankruptcy will not be sufficient. And, indeed, under the 21 Jac. 1. c. 19. it was determined, that if an act of bankruptcy was committed, and then a sale made by the bankrupt — and then another act of bankruptcy — and a commission was sued out within five years after the last act, but above five years after the first — the sale should not be defeated under these circumstances; for an act of bankruptcy to avoid a sale under that

(1) The knowledge would, of course, now be confined to an *act of bankruptcy*; for knowledge merely of *insolvency*, or *stoppage of payment*, can (under the new act)

no longer be considered as constructive notice. See post, 696.

(2) *Mavor v. Payne*, 3 Bing. 285.

(3) *Ibid.*

statute must have been committed before the sale, and also within five years before the commission. (1)

*As to purchasers.*

A subsequent act of bankruptcy, however, has been holden not to defeat the interest which creditors have acquired in the bankrupt's estate by a prior act; therefore, where after one act of bankruptcy was committed, another was committed by an outlawry, and the king thereupon made a lease of the profits of the bankrupt's lands, and a grant of his chattels, — the lease and grant were held, under the 21 Jac. 1. not to prejudice the creditors of the bankrupt, the commission being sued out within five years after the first act of bankruptcy. But if the commission had been sued out five years after that act of bankruptcy, then the assignee of the king's lease would have been considered a purchaser within the statute (2), and not to be impeached.

A subsequent act of bankruptcy does not defeat the effect of a former one.

The relation of the act of bankruptcy, as it affects the right of a mortgagee to tack further advances made after an act of bankruptcy, has been already considered in a former chapter. (3)

### SECTION III.

#### *As to other Dispositions of the Bankrupt's Property.*

The 81st section of the new act (as we have already seen) not only applies to purchasers, but to *all contracts and other dealings and transactions* made with a bankrupt more than two calendar months before the date and issuing of the commission.

The assignees, being subject to the same equities as the bankrupt, are bound by the beneficial transfer of property

Bill of exchange delivered

(1) *Bradford v. Bludworth*, 1 Lev. 15. 2 Sid. 69. *Spencer v. Vanacre*, Keb. 722.; and see *Jellif v. Horn*, Keb. 1 L.

(2) *Pain v. Teap*, 1 Salk. 108.  
(3) Chap. IX. sect. 6.

Other dispositions of property.

more than two months, and indorsed within that period.

Goods at sea assigned before bankruptcy.

Other goods cannot be substituted after act of bankruptcy for goods assigned before.

Ships at sea, when act of bankruptcy.

*bonâ fide* made by him before the bankruptcy, although before such transfer is strictly completed at law the act of bankruptcy may intervene. Thus, where a bill of exchange was merely *delivered* by a bankrupt to the indorsee (though with the real intent of transferring the property in it to him) more than two months before the commission, but the indorsement was not, in effect, written upon it until within the two months, — Lord Ellenborough held, that the writing of the indorsement had reference to the delivery of the bill, and that the indorsee was entitled to it against the assignees. (1) And in another case, where the indorsement was not made even until after the commission issued, it was equally holden to be valid. (2)

Upon the same principle, in the case of goods at sea, where a *bonâ fide* assignment is made of the property before the act of bankruptcy, and the bills of lading are not indorsed till afterwards, the indorsement of the bills of lading cannot be impeached. (3) But, though the legal transfer of property, which has been equitably assigned before an act of bankruptcy, can be perfected afterwards, — yet other property cannot be then substituted for the property originally assigned. Therefore, where a trader pledged for value the bills of lading of an expected cargo, part of which his agents abroad without his knowledge had disposed of — and after having committed an act of bankruptcy, he then caused other goods to be substituted, and sent the bills of lading of these goods to the pawnees, — it was held, in this case, that the pawnees could not retain the substituted goods against the assignees. (4)

With respect to the transfer of property in *ships at sea* (in order to give effect to which certain forms are required by the registry act (5)) it is now settled, that notwithstand-

(1) Anon. 1 Camp. 492.

(2) *Smith v. Pickering*, Peake, 50.; and see *Ex parte Greening*, 13 Ves. 206.

(3) *Lempriere v. Pasley*, 2 T. R.

485. *Brown v. Heathcote*, 1 Atk. 160.

(4) *Meyer v. Sharpe*, 5 Taunt. 74.

(5) 4 G. 4. c. 41. s. 35, 36, 37.; and see ante, 418.

ing an act of bankruptcy intervenes between the execution of the bill of sale, and the full compliance with all the requisites of the registry act, — yet if all those requisites are in fact finally complied with pursuant to the directions of the statute, the transfer of the property will be held good against any claim of the assignees. For the bill of sale is held now to pass the *absolute* property in the ship, subject only to be divested in case the directions of the registry act are not pursued. Therefore, a power of attorney from a bankrupt to sign an indorsement on the certificate of registry of a ship when she returned home, in order to give effect to a previous bill of sale, is not revoked by a subsequent act of bankruptcy — it being only a power to do a mere formal act, which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy. (1) Where, however, the act of bankruptcy intervenes between the bill of sale, and the completion of the forms required by the registry act, and there is at the same time *gross delay* in the completion of those requisites, — then the bill of sale will become void as against the assignees. (2) And where certain things regarding the registry are directed to be done, without specifying any given time for their completion, they must be done within a reasonable time; which (Lord Ellenborough observed) is as capable of being ascertained by evidence, as if it had been fixed by the act of parliament. (3)

Where a trader after a secret act of bankruptcy consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader, and afterwards sold the goods and received the money, — the factor was held to be answerable to the assignees for the value of the goods, upon the ground of relation back to the act of bankruptcy. (4) So

*Other dispositions of property.*

cy between the bill of sale and the completion of the requisites of registry act.

Power of attorney to sign indorsement on the register not revoked by bankruptcy.

When there is gross delay.

Goods consigned to and sold by a factor after an act of bankruptcy.

(1) *Dixon v. Ewart*, Buck, 94. (2) *Moss v. Charnock*, 2 East, Meriv. 322.; and see *Palmer v.* 599. Per Bayley J. 2 M. & S. 51. *Moron*, 2 M. & S. 43. *Mestaer* (3) 2 M. & S. 50. *Gillespie*, 11 Ves. 637. *Hubbard* (4) *Copeland v. Stein*, 8 T. R. 199. *Johnston*, 3 Taunt. 208.

*Other dispositions of property.*  
 —

an agreement between the bankrupt and the defendants before the bankruptcy, that the defendants should accept bills, to enable the bankrupt by his agent abroad to purchase cargoes and transmit them to the defendants, who were to pay their acceptances out of the proceeds, and to place the surplus to the account of the bankrupt, — is no defence to an action by the assignees for proceeds received by the defendants *after the bankruptcy*. (1)

The relation to the act of bankruptcy of one partner, as it affects subsequent transfers of the partnership property by the solvent partner, has been already fully considered in the preceding chapter. (2) It is greatly to be lamented, that so much difference of opinion prevails upon this very important branch of the bankrupt law between the courts of law and equity.

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#### SECTION IV.

##### *Of Executions and Attachments.*

Executions and attachments levied more than two months before commission, good.

Execution creditors put on the same footing as others;

By the 81st section before referred to, all executions and attachments against the lands and tenements, or goods and chattels, of a bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of the commission, are declared to be valid, notwithstanding any prior act of bankruptcy, provided the person, at whose suit such execution or attachment shall have issued, had not at the time notice of any prior act of bankruptcy. (3)

But by section 108. (4) no creditor having security for his debt, or having made any attachment (in London or any other place by virtue of any custom there used) of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of

(1) *Carter v. Barclay*, 1 Star. 43.

(2) Ante, 651.

(3) And see 21 Jac. 1. c. 19. s. 9. s. 9.  
 49 G. 3. c. 121. s. 2.

(4) The first part of this section follows nearly the 21 Jac. 1. c. 19.



his debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or lien upon, any part of the bankrupt's property before the bankruptcy. And no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with the other creditors.

The last part of the above section is adopted from the Irish statute of the 11 & 12 G. 3. c. 8. s. 5.; and is also an extension of the provision of the 3 G. 4. c. 39. s. 2. & 3., which declared all warrants of attorney and cognovits to be void, as against assignees, unless they were filed within twenty-one days after their execution. The new provision seems a very wholesome one to prevent a fraudulent preference of a favourite creditor.

As an execution, in order to have any legal operation, must (under the above section) be served and levied by seizure, the writ being merely *tested* before the bankruptcy is insufficient — or even being previously delivered to the sheriff; for such delivery is not an execution of it. (1) So an execution of the writ, by a delivery of the warrant to a shopman of the trader as a special bailiff — though there were no regular bailiffs in the county into which the writ was issued — has been holden not to be a sufficient execution of the writ, so as to protect the property against the claims of the assignees, by reason of the reputed ownership. (2) But where the goods are actually seized by the sheriff *bonâ fide* before the act of bankruptcy, that is sufficient to render the execution valid. (3)

When the act of bankruptcy is by *lying in prison*, and an execution is executed after the first arrest, though before the act of bankruptcy is complete by lying in prison

*Executions, &c.*

unless levy made before the bankruptcy.

Execution on judgment by default or confession not to be preferred.

Execution merely tested, or delivered to sheriff before bankruptcy, insufficient.

Delivery of warrant to shopman of bankrupt not a sufficient execution.

Execution levied after arrest, when

(1) *Phillips v. Thompson*, 3 Lev. 69. 191. *Bayley v. Burning*, 1 Lev. 173. *Smallcombe v. Cross*, 1 Ld. R. 251.

(2) *Jackson v. Irvin*, 2 Camp. 48.

(3) *Cole v. Davies*, 1 Ld. R. 724.

*Execu-  
tions, &c.*

act of  
bank-  
ruptcy is  
lying in  
prison.

Where  
the levy  
and act of  
bank-  
ruptcy the  
same day.

Whether  
the crown  
will be  
preferred.

As to ope-  
ration of  
an extent.

the full time required by the statute, — it has been held, that the execution is avoided, by relation to the first arrest. (1)

With respect to the validity of executions and attachments against partners, where *one* of the partners has previously committed an act of bankruptcy, the reader is referred to the preceding chapter.

If the goods be seized by the sheriff the *same day* that the party commits an act of bankruptcy, it is open to inquire which had the priority; and the validity of the execution has been held to depend upon such priority. (2) So, where the sheriff took possession, and the same day at a later hour the bankrupt surrendered in discharge of his bail, the execution has been holden valid. (3) But where an *extent of the Crown* issues the same day that the assignment of the bankrupt's effects is made to the assignees, in this case, it has been held that the *Crown* shall be preferred (4); — though it seems very doubtful now — since the old maxim in law (of there being no fraction of a day) has been broken in upon by many subsequent decisions (5) — whether the Crown would really be preferred, where the assignment was *bonâ fide* executed before the issuing of the extent.

An extent of the Crown binds the property of the king's debtor from the *teste* of the writ, or rather from the time of the *fiat*; for the writ, at whatever time it issues, may always be tested the same date as the *fiat*, though it cannot be tested before. (6) Therefore, if it is issued at any time previous to the execution of the commissioners' assignment — (before which the property is not legally out of the bankrupt (7)) — it will be preferred to the claim of the assignees; and this preference, it seems, will prevail as

(1) *Coppendale v. Bridgen*, 2 Burr. 814.; but see ante, 79.

(2) *Sadler v. Leigh*, 4 Camp. 197.

(3) *Thomas v. Desanges*, 2 B. & A. 586.

(4) *Rex v. Crumpton*, cit. 2 Ves. 295. Parker's Rep. 126.

(5) *Saunderson v. Gregg*, 3 Star. 72.; and see ante, 862.

(6) *Rex v. Mann*, Str. 749. West on Extents, 58.

(7) *Queen v. Arnold*, 7 Vin. Ab.

well with respect to *debts* due to the bankrupt at the time of the teste, as with the bankrupt's *goods* (1); for the *Crown* is not affected by the operation of the assignment, in relation back to the act of bankruptcy. (2) And where goods were seized under an extent, and the writ and inquisition returned by the sheriff, — though the debtor becomes a bankrupt before the issuing of the liberate, the execution of the extent is good (3) against the assignees.

*Execu-  
tions, &c.*

If an extent is issued after the date of the bargain and sale of the bankrupt's lands, but before inrolment, it seems that the extent will be preferred to the bargain and sale; for it has been held, that in *bankruptcy* the inrolment does not (as in other cases) relate back to the date of the bargain and sale. (4)

Where  
extent pre-  
ferred to  
bargain  
and sale.

For further information, as to the operation of extents, and other process for the recovery of the king's debt, the reader is referred to a former chapter (5), where the effect of the assignment upon the process of the Crown has been already fully considered.

## SECTION V.

### *What is Notice of an act of Bankruptcy.*

It will have been observed in the progress of this inquiry, as to the effect of the relation to the act of bankruptcy, that (with the exception of purchases made more than twelve calendar months before the commission issues, and process at the suit of the Crown) the validity of any dealing or transaction with the bankrupt, under any of the foregoing circumstances, depends entirely upon the person so dealing with him having *no knowledge or notice* that he had

(1) *Ibid.*; and see ante, Chap. XI. Part 2. sect. 10.

(3) *Audley v. Halsey*, Cro. Car. 148. Jones, 203.

(2) *Attorney General v. Capel*, 2 Str. 480.; and see 2 Str. 982. 4 T. R. 411.

(4) *Rex v. Hopper*, West on Extents, 149. et seq. Christ. 533.; and see ante, page 349.

(5) Chap. XI. Part 2. sect. 10.

**Notice.**

committed an act of bankruptcy. A most important branch of the law of relation, therefore, remains to be considered, viz. what amounts to *notice* of a previous act of bankruptcy sufficient to avoid a payment to, or a dealing with, the bankrupt — which payment or dealing would otherwise have been good.

**How notice formerly considered.**

The *notice*, which would deprive a party of the protection given him by former acts of parliament, has been defined very differently in the various statutes; some confining it to *actual knowledge* (1) of an act of bankruptcy, while others extended it to notice “of an act of bankruptcy, or *insolvency*” (2), or of “bankruptcy, insolvency, or *stoppage of payment*.” (3) And by Sir Samuel Romilly’s acts it was *first* declared, that the mere striking of a docket (4) — and afterwards, that the issuing of a commission only (5) — should amount to *constructive* notice of an act of bankruptcy; — this last provision being in conformity with the old rule of law, namely, that the issuing of a commission was a public act, of which all the world was bound to take notice. (6)

**When the issuing of a commission to be deemed notice.**

But by *section 83.* of the new statute, the issuing of a commission is only declared to be notice of a prior act of bankruptcy (if an act of bankruptcy has been actually committed before the issuing of the commission) — provided the adjudication of bankruptcy shall have been notified in the London Gazette, and the person to be affected by such notice may reasonably be presumed to have seen the same.

**Corporation or**

By *section 85.*, also, if any accredited agent of any *body*

(1) 1 Jac. 1. c. 15. s. 14.

(2) 19 G. 2. c. 19. s. 14.

(3) 46 G. 3. c. 135. s. 1.

(4) Ibid. s. 3.

(5) 49 G. 3. c. 121. s. 2.

(6) *Hitchcock v. Sedgewick*, 2 Vern. 156. *Watkins v. Maund*, 3 Camp. 308.; but see *Sowerby v. Brooks*, 4 B. & A. 523. in which Lord C. J. Abbott very justly observes, that the words “*understand*

or *known*,” in the statute 1 Jac. 1. c. 15. s. 14. (upon the construction of which that case was decided) must be construed according to their ordinary and popular sense, viz. an *actual* understanding or knowledge, and not a knowledge to be implied by force of law (from the secret issuing of an *unknown* commission) against the truth of the fact.

corporate or public company shall have had notice of any act of bankruptcy, the corporation or company shall be thereby deemed to have had such notice.

**Notice.**  
public  
company.

The *notice*, as defined by the new statute (1), is simply “*notice of a prior act of bankruptcy*,” — and the only *constructive* notice is the *issuing of a commission*, provided a previous act of bankruptcy has been actually committed, and the adjudication has been notified in the Gazette, and the person to be affected by the notice may reasonably be presumed to have seen the same.

How no-  
tice speci-  
fied in new  
act.

The only *actual notice*, therefore, that will now prejudice a party, being confined to the *act of bankruptcy*, it becomes *immaterial* to consider those cases, decided with reference to the former statutes, and determining what would and what would not amount to notice of insolvency (2), or stoppage of payment.

When the act of bankruptcy consists in the execution of a fraudulent deed, it has been determined that notice of the deed by a person, who is *not a party* to it, is not sufficient notice of the act of bankruptcy. (3)

As to no-  
tice of a  
fraudulent  
convey-  
ance.

(1) See *Sections* 81, 82. 50.

(5) *Read v. Ward*, 7 Vin. 119.

(2) Anon. 1 Camp. 492. n. *Bayly*  
*v. Schofield*, 2 M. & S. 338.



## CHAP. XVII.

## OF SET-OFF.

- SECT. 1. *Of the Right of Set-off generally in Bankruptcy.*  
 2. *Construction of the Term "Mutual Credit," and herein of Cases of Trust and Deposit.*  
 3. *As to joint and separate Debts.*  
 4. *Set-off between particular Persons.*  
 5. *Set-off on Bills and Notes.*  
 6. *Of an equitable Set-off.*  
 7. *Of the Mode of balancing the Accounts.*
- 

## SECTION I.

*Of the Right of Set-off generally in Bankruptcy.*

Provision  
of the  
new  
statute.

**B**y the 50th section of the new act it is provided, that where there has been *mutual credit* given by the bankrupt, and any other person; or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit given, or the debt contracted by him; and what shall appear to be due on either side on the balance of the account shall be claimed or paid on either side respectively; and every debt or demand, made proveable by the statute against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy committed by the bankrupt.

This section has consolidated the provisions of the 5 G. 2. c. 30. s. 28. and the 46 G. 3. c. 135. s. 3.; but it has also made some *alterations* in the enactments of those statutes, which it may be as well in the first place to notice. *First*, the credit need not now be given (as by the 46 G. 3. c. 135.) two months before the date of the commission; therefore, the accounts may now be taken down to the date of the commission. (1) *Secondly*, the notice, by which the party is to be affected, is confined simply to *notice of an act of bankruptcy*; and it is now, therefore, immaterial to inquire whether the party had notice that the bankrupt was insolvent, or had stopped payment. *Thirdly*, the statute declares that *every debt or demand, which may be proved*, may also be set off against the bankrupt's estate. Consequently all those cases (2), which have been decided not to be within the provision as to mutual credit, because the debt was *contingent*, would now meet with a different decision; as such debts may now be proved under the 56th section of the new statute. But, with this exception, it does not appear that there is any provision in the new statute to constitute a case of mutual credit, which was not so before. (3) And as the accounts may, also, now be taken down to the date of the commission, provided the party had no notice of an act of bankruptcy when the credit was given, he will not now be deprived (as he was before the statute) (4) of his right to retain a payment made to him by the bankrupt after an act of bankruptcy, for the purpose of taking up bills not due, but which he has made himself liable to pay when due, for the bankrupt's accommodation.

*Right of.*  
Alter-  
ations in  
the former  
law.

The right of set-off in Bankruptcy did not, as has been frequently supposed, originate in the statute law; but was

As to  
origin of  
set-off;

(1) See *Southwood v. Taylor*, 301. *Sampson v. Burton*, 2 B. & A. 471. as to the effect of the 46 G. 3. B. 89. *Dobson v. Lockhart*, 5 T. R. 133.

(2) *Ex parte Groome*, 1 Atk. 115. *Hancock v. Entwistle*, 3 T. R. 435. *Ex parte Whittaker*, 1 Rose,

(3) *Eden*, 184.

(4) *Tamplin v. Diggins*, 2 Camp. 512.

Right of.

more extensive in bankruptcy than under the general statutes.

(before any interference of the legislature) adopted in practice by the courts of law, which permitted a creditor to set off his debt against his bankrupt debtor, and to pay over or prove the balance, as the case might happen to be. (1)

And this remedy or right of set-off of the *creditor of a bankrupt* is more comprehensive and effectual, than the *general* law of set-off under the statutes of the 2 G. 2. c. 22., and 8 G. 2. c. 24. — in the construction of which, indeed, doubts were formerly entertained whether those statutes could be extended to assignees under a commission of bankruptcy (2), on the ground that there was no *mutual debt* between the assignees of a bankrupt and the creditor. But, though the right of set-off in bankruptcy is perfectly distinct and independent from that given by the general statutes of set-off, yet the latter are held now to extend to actions by assignees, concurrently with the provision of the bankrupt law as to cases of mutual credit. (3) It is not, however, intended to discuss *every* case that has been decided under the general statutes of set-off, but only those in which any point of bankruptcy has been agitated in the course of the decision.

(1) Anon. 1 Mod. 215. *Chapman v. Derby*, 2 Vern. 117.; and see 1 Christ. B. L. 279. 499. 1 Goodinge B. L. 190. The first statute that took notice of the right was the 4 & 5 Ann. c. 17. which was continued for five years by the 7 Ann. c. 25. s. 4. This last stat. was re-enacted with some variation by the 5 G. 1. c. 24., which, also, was but a temporary act; and after its expiration, a similar but

more effectual provision relative to mutual debts and credits was incorporated in the 5 G. 2. c. 30. s. 28. Next came the additional provision of the 46 G. 3.; which last provision, together with that of the 5 G. 2. seem to have formed the ground-work for the enactment in the present statute.

(2) *Ryall v. Larkin*, 1 Wils. 155.

(3) *Ridout v. Brough*, Cowp. 135. *Lock v. Bennet*, 2 Atk. 45.



## SECTION II.

*Construction of the Term "Mutual Credit," and herein of Cases of Trust and Deposit.*

The above enactment of the new statute, we perceive, (in accordance with that of the 5 G. 2. c. 30. s. 28.) relates not only to *mutual debts*, but to *mutual credits*. There are many cases, therefore, to which a set-off may be extended where an action would not lie, and where a court of equity even could not upon a bill decree an account. (1) The statute, also, is not to be construed as confined to dealings in *trade* only, or to cases where there are mutual running accounts; for it is but natural justice and equity, that in *all* cases of *mutual credit*, only the balance shall be paid. (2) The term "mutual credit" has, indeed, always received from the courts a very liberal construction, and has likewise not been confined merely to *pecuniary* demands; for, as Lord Hardwicke observed, it would be hard where a man has a debt due from the bankrupt — and has at the same time goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity — that the assignees should take them from him without satisfying his whole debt. (3) This observation, however, must be confined to a case, where a party has (either by usage, custom, or contract) a *lien* for his general balance on goods of a bankrupt deposited with him — or, where the credit given by the delivery of the property must in its nature *terminate* in a *debt*. (4) The right of *set-off* is, indeed, at *common law* always incident to the right of *lien*; but the amount of the set-off will depend upon the nature and extent of the *lien*. Thus, a *Factor*, having by law a *lien* for his *general*

As to construction of the term "mutual credit."

As applicable to a case of general lien, or where the credit must terminate in a debt.

Factor.

(1) *Ex parte Deeze*, 1 Atk. 228.  
*French v. Fenn*, C. B. L. 554. *At-*  
*kinson v. Elliott*, 7 T. R. 578.

(2) *Lanesborough v. Jones*, 1 P. Wms. 325.

(3) 1 Atk. 228.

(4) *Rose v. Hart*, 8 Taunt. 499.

*Mutual  
credit.*

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Fuller.  
Miller.

*balance*, will have a right to set off the *whole of his debt* due from the bankrupt; and (in his case) not only by virtue of such general lien, but also by reason that the goods delivered to him were delivered for the purpose of sale, and therefore constituted such a credit as must terminate in a debt. But a *Fuller* or a *Miller*, who have only a particular lien, and to whom the cloths and the corn are delivered, not for the purposes of sale, but merely to be respectively dressed and ground — a delivery, consequently, which is not such a credit as *must terminate in a debt* — have neither of them a right of set-off, beyond the amount of their respective charges for their labour bestowed on the *specific goods* remaining in their possession. They have, therefore, not a right of set-off under the present, or indeed under any of the former statutes relating to bankrupts; for the term “mutual credit” cannot be extended (1) to a case of this description.

The above observation, indeed, of Lord Hardwicke in *Ex parte Deexe*, has been commented upon in many decisions, as if it was applicable to every case of deposit or mutual trust, whatever may be the *object* or *purpose* of the deposit or trust. But Lord Chief Justice Gibbs has clearly shown in the above-mentioned case of *Rose v. Hart*, that though something more is meant by the term *mutual credit* than the words *mutual debt* import, — yet as the statute says that upon stating the account one *debt* may be set against another, this implies that the legislature meant *such credits* only as *must in their nature terminate in debts*. As when a debt is due from one party, and credit is given by him to the other for a sum of money payable at a future day, and which will *then become a debt* — or where there is a debt on one side, and a delivery of property with directions to turn it into money, on the other; — in such cases, the *credit given* by the delivery of the property *must in its nature terminate in a debt*; the balance will be taken on the two

(1) *Rose v. Hart*, 8 Taunt. 499.

debts, and the words of the statute will in all respects be complied with. But where there is a *mere deposit* of property, without any authority to turn it into money, *no debt* can ever arise out of it; and, therefore, it is *not a credit* within the meaning of the statute. This principle, his Lordship says, will support all the cases that have been determined on the subject; that is, all those cases in which there was no evidence of the right of a *lien* for the general balance.

*Mutual credit.*

Case of mere deposit.

The general right of *lien* depends upon totally different principles from the doctrine of *set-off in Bankruptcy* — though in many of the reported cases it is not very clear, whether the determination proceeded in respect of the set-off, or the lien. Where the creditor is entitled to a *general lien*, then he may, independently of any statute as to set-off or mutual credit, retain the goods in his possession until he has been satisfied his whole debt. As where a *packer* had goods of the bankrupt's in his hands, and there was evidence of a custom that packers had a *general lien* upon all goods in their possession, it was decided, that he might retain the goods for the whole of his demand. (1) But in the case of the *mill* before mentioned, who had corn and flour of the bankrupt's in his possession, and where there was no evidence of any custom in the trade entitling him to a *general lien*, he was only allowed to retain for the price of grinding the specific corn. (2) These cases, therefore, seem to establish the position that, unless on the ground of usage or positive agreement, a depository of goods for other

Distinction between *lien* and *set-off*.

Packer.

Miller.

(1) *Ex parte Deeze*, 1 Atk. 228. This evidence of the *custom* does not appear in the report of the case itself; but the fact was so stated by Lord Hardwicke in the subsequent case of *Ex parte Ockenden*, when he was pressed with his former decision in this case. And these *general observations* of his, therefore, in *Ex parte Deeze*, being unaccompanied by any state-

ment of the real ground of his decision, have been the cause, perhaps, of their receiving in subsequent cases somewhat too great a latitude of construction. See an able analysis of all the cases on this subject in Eden's B. L. 179. et seq.

(2) *Ex parte Ockenden*, 1 Atk. 234.

**Mutual  
credit:**  

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purposes than that of sale has no right under the particular provision in the new statute as to *mutual credit*, to set off against the value of such goods the whole of a debt due from the bankrupt to himself.

**Cases of  
trust.**

A *trust*, however, between two parties, where the object of the trust was the *sale of goods*, and one party was indebted to the other on another account, has been decided to be a mutual credit within the former statutes. Thus, where three persons joined in an adventure to buy and sell pearls, one of whom was to advance the money and to sell the pearls, but the profit and loss was to be divided between the three; — one of the parties becoming bankrupt, the party (who was to sell the pearls) was allowed to set off a debt due to him from the bankrupt, in an action commenced against him by the assignees, against the third share of the pearls belonging to the bankrupt, — although the pearls were not sold, nor the produce received, until after the bankruptcy: (1)

So where A. purchased of B. a parcel of goods, and afterwards a second parcel, both at six months' credit, and when the first sum became due, lodged in the hands of B. a bill of exchange for a larger amount than the value of the goods, in order to pay what then remained due in respect of the *first parcel*, B. engaging to return the overplus when the bill should be paid — it being understood that this deposit was not a general deposit to answer both demands, but for the specific purpose of securing only the remainder of the value of the *first parcel* — B. received the amount of the bill, and then A. became bankrupt, not having paid for the *second parcel*: — upon an action brought by A.'s assignees for the surplus of the bill, it was held, that B. might retain it to satisfy his demands on A. for the *second parcel*, — Lord Kenyon observing that he agreed with the doctrine, that where there is a *trust* between both

(1) *French v. Fenn*, C.B. L. 536.

parties, there is a *mutual credit*; and that justice required that the whole account on both sides should be stated, and that the balance should be the only thing to constitute the debt. (1)

*Mutual  
credit.*

So, also, where a principal *entrusted* his broker with a policy of insurance to receive an average loss under it, and then became a bankrupt — and the broker afterwards received the average loss, — he was allowed to set off several sums of money due to him from the bankrupt for premiums, &c. against the amount he received upon the policy after the bankruptcy; for the average loss was held to be a debt due before the bankruptcy, though not ascertained till afterwards. (2)

Insurance  
broker.

In another case, A. (a merchant) employed B. (a broker) to effect policies and sell goods, and *trusted* him with the possession of the policies and the goods; A. being indebted to B. for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those goods to the exclusion of A.'s general credit, became bankrupt: afterwards a loss happened on one of the policies, and B. received it from the underwriters; — this was decided to be a case of mutual credit, and that B. might retain the sum received for the loss, not only in liquidation of the balance due for premiums, but also of his advances — Lord Chief Justice Gibbs (who tried the case) deciding it on the ground, that he bankrupts had *trusted* the defendants with the possession of goods and of policies of insurance, and that the defendants had *trusted* the bankrupts with the money advanced, and the premiums paid for them on the policies; and that the general principle was, that wherever each party has *trusted* the other with the possession of value, the assignees of either party (in case of his bankruptcy) can

(1) *Atkinson v. Elliott*, 7 T. R. 8.; but see *Key v. Flint*, post, 8. (2) *Whitehead v. Vaughan*, C. B. L. 566. *Parker v. Carter*, ibid. 567.

**Mutual  
credit.**

**Accept-  
ance not  
due till  
after bank-  
ruptcy.**

only withdraw that value from the other, on the terms of paying what is due between them. (1)

A sum of money, also, payable after the bankruptcy at a future day, though not in strictness a mutual debt, is held to be within the meaning of the term "*mutual credit*." (2) Thus, where A. lent his acceptance to the bankrupts, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons — and A. paid the amount after the commission issued, and before an action was brought against him by the assignees for a debt owing by him to the bankrupt; — it was holden, that he was entitled to set off the amount of such payment under the words "*mutual credit*." (3) So, where certain bankers had discounted bills of exchange for the bankrupt, giving him credit for their value in his account — and while they were still running, struck a balance, by which they admitted themselves indebted to the bankrupt — and after his bankruptcy the bills were dishonoured; — it was held, that in an action by the assignees for the balance admitted to be due before the bankruptcy, the bankers had a right to set off the amount of the dishonoured bills. (4)

In all these cases it will be observed, that what was allowed as a *mutual credit* was of such a nature, as must terminate in a *cross debt*. Thus in *French v. Fenn*, there was a debt due from one party to the other, and one party was entrusted by the other with his share in the pearls for sale, which (when sold) would of course constitute a *cross debt* in respect of the proceeds. So in *Whitehead v. Vaughan* and *Olive v. Smith*, the bankrupts were indebted to the defendants, and delivered policies of insurance to them to collect losses, which (when collected) would make the defendants their *debtors* for the amount. And in *Smith v.*

(1) *Olive v. Smith*, 5 Taunt. 56. Ex parte *Boyle*, C. B. L. 542. Ex

(2) Ex parte *Prescott*, 1 Atk. parte *Wagstaff*, 13 Ves. 65.  
230.

(4) *Arbousin v. Tritton*, 1 Holt

(3) *Smith v. Hodson*, 4 T. R. 211. N. P. C. 408.

*Hodson*, the defendant had entrusted the bankrupt with his acceptance which he was liable to pay, and which, (when paid) would create a *debt* from the bankrupt to him for the amount.

*Mutual  
credit.*

There is another case under this head, which seems to have gone further than any of the preceding, inasmuch as the delivery of the goods to constitute the debt was only a *constructive* delivery to the party dealing with the bankrupt, while in all the other cases, the property had been either actually delivered, or was already in the possession of the party. *J. S.* being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants (through whom the shipment was to be made) that the goods were the property of *A.*, and shipped on his account — and *A.* accordingly (by the desire of *J. S.*) wrote to the merchants, stating the fact to be so, and directing them to insure, and advance money to *J. S.* on the goods, which was done: — *J. S.* at this time was largely indebted to *A.*, and afterwards became bankrupt; — under these circumstances it was held, that this was a credit given to *A.* by *J. S.* by the delivery of goods in its nature likely to terminate in a debt; and that *A.* was not only entitled to recover the proceeds of the shipment from the merchants, but to set off against those proceeds the amount of the debt due to him from the bankrupt. (1)

Constructive delivery of goods.

But where a bailee is entrusted with property of a bankrupt for a *special and limited purpose*, then (like the case of the miller and the fuller who have no general lien) such a transaction does not form a case of *mutual credit* within the meaning of the statute. As where the bankrupts deposited a bill of exchange with a creditor, for the specific purpose of raising money on it, and not as a satisfaction of his debt; — it was held, that the creditor (having only advanced part of the amount) could not, in an action of trover by the assignees, retain the bill for his general balance

Bailee for a special purpose.

(1) *Easum v. Cato*, 5 B. & A. 861.

*Mutual credit.*

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previously due to him from the bankrupts, but only for the money actually advanced by him on the bill. (1) And Lord Eldon, when the same case came afterwards before him on petition, said, that it was contrary to natural equity, that a creditor who had made advances on the security of a bill of exchange deposited with him for a special purpose, and who had undertaken to receive the amount when due, and return the surplus, should set off advances *prior to the transaction* against a demand by the assignees for the bill. (2)

Acceptance in hands of third person.

It is not necessary, in order to constitute a case of mutual credit within the meaning of the statute, that the parties *intended to trust* each other in the transaction; for if a bill of exchange, which is accepted by the bankrupt, be sent out into the world, credit is then given to the acceptor by every person who takes the bill. (3) Thus, where a bill accepted by A. got into the hands of B., and B. bought goods of A.; — it was holden that there was a *mutual credit* between A. and B., although A. did not know that the bill was in B.'s hands. (4)

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### SECTION III.

*As to joint and separate Debts.*

(And see post, Section VI.)

The debt due, or credit given, must be in the party's own right.

In order to establish a clear right of set-off, it is essential that the debt claimed to be due to either party, or the credit given, should be due to or given by him *in his own right*, and not in the right of another person; for, though

(1) *Key v. Flint*, 8 Taunt. 21. 1 Moore, 451.

(2) *Ex parte Flint*, 1 Swanst. 50. This decision certainly appears somewhat at variance with that of *Atkinson v. Elliott*, ante, 705., though Lord C. J. Dallas thought there was a distinction between

the two cases, inasmuch as the form of action in that case was *assumpsit*, and in this *trouer*.

(3) Per Buller J. 5 T. R. 508. (note).

(4) *Hankey v. Smith*, *ibid.*; and see *Sheldon v. Rothschild*, 8 Taunt. 156.



the statute is intended to give a certain extension to the right of set-off at law, yet it does not take away the necessity of what was before required in these cases, viz. a *strict mutuality*. Therefore, there can be no set-off between *joint and separate* debts. This principle, indeed, has always prevailed at law; and though in bankruptcy such a set-off has been in some cases formerly permitted (1), yet it seems to be now established, that (unless there is a special agreement between the parties to the contrary) the same rule in this respect ought to govern set-off in bankruptcy, as well as set-off at law. (2) Thus, where A. had a joint demand against B. and C., who were also joint creditors of A. — and B. and C. having dissolved their partnership, B. (by a letter addressed to A.) made himself *separately* liable to A. on account of the joint demand of A. against himself and C.; — Lord Eldon held, that B. was under these circumstances not entitled to set off against A.'s demand (though originally joint) the joint debt due from A. to B. and C.; for that, when B. made himself *separately* liable to A., his doing so did not make the joint debt, due from A. to B. and C., a *separate* debt to B. (3) And the same rule, that a joint debt cannot be set off against a separate demand, prevails also in equity, as well as in bankruptcy and at law. (4)

*Joint and separate debts.*  
————

As to joint and separate debts.

But, where a *joint* debt has — by the death of all the persons but one to whom it was jointly due — become a debt to the survivor, it has been held under the statutes of set-off at law, that such a debt may then be considered as a *separate* debt, and may be set off against a debt due from such survivor in his own right. (5) And, in like manner, a defendant may set off a debt due to him from the plaintiff as *surviving partner*, against a debt due from himself to the

Where joint debt becomes by the death of parties a debt due to a sole survivor.

(1) *Ex parte Edwards*, 1 Atk.

(3) *Ex parte Ross*, Buck. 125.

100. *Ex parte Quinten*, 5 Ves. 248.

(4) *Addis v. Knight*, 2 Meriv.

(2) *Ex parte Christie*, 10 Ves. 117.

105. *Ex parte Twogood*, 11 Ves.

(5) *Slipper v. Slidstone*, 5 T. R.

517.; and see *Doc v. Darnton*, 493.

5 East, 149.

*Joint and separate debts.*

Joint and several bond.

Where the name of *one partner only* appears in the business.

Note indorsed by joint debtors to another firm, in which some of them were partners.

Statute does not apply where *some partners only* of a firm become bankrupt.

plaintiff in his own right. (1) So a joint and several bond may be set off against only one of the obligors who executed it; for the bond, being *joint and several*, became the separate debt of both. (2) So, in an action by several partners, where the name of *one only appeared* in the business, the defendant was allowed to set off a debt due to him from that one partner — the other partners having (as Lord *Kenyon* expressed it) held out false colours to the world, by permitting that one partner to appear as the sole owner. (3) So also, where the defendants gave their bankers a note on account of a demand which the bankers made on them, but which afterwards proved to be much less than the sum for which the note was given — and the bankers indorsed the note to another firm, which was formed of *some of the partners of the banking house* — and the holders brought an action against the defendants; — the defendants were held entitled to set off a debt due to them from the bankers; for the parties who brought the action (being partners in the banking house) could not, *as between themselves*, divert the note to *another purpose*, and leave the whole of the defendants' debt outstanding. (4)

As the statute also only relates to mutual credits between *bankrupts* and other persons, it will not apply to a case where only *some* partners of a firm are bankrupt. Consequently, though an action be brought by the assignees of the bankrupt partners together with the solvent partner against a defendant on account of a partnership debt, the defendant, if he is not entitled to a set off at law, is not entitled under the foregoing enactment as to mutual credit; for in such a case, if *any* credit existed, it was between the *bankrupts* together with *a solvent person* on the one side, and the defendant on the other. Therefore, where three partners, A. B. and C., delivered bills to D.

(1) *French v. Androde*, 6 T. R. 582.

(2) *Fletcher v. Dyche*, 2 T. R. 32.

(3) *Stacey v. Ross*, 2 Esp. 269.

(4) *Puller v. Roe*, Peake, 197.; and see post, as to equitable set-off.

for a special purpose, and A. and B. became bankrupts, — it was held, that in an action brought by their assignees (together with the solvent partner C.) against D., for the proceeds of the bills, the defendant could not set off against such claim a debt due to him from A. B. and C. (1)

*Joint and  
separate  
debts.*  
——

#### SECTION IV.

##### *Of Set-off between particular Persons.*

A debt, due to an *executor* in his *representative* character, cannot be set off against a debt due from him on his *private* account. (2) And though the executor also happen to be residuary legatee, such a set-off will not be allowed; for these are debts in different rights, and there is no mutual credit. (3) But, where an executor had furnished money and goods to a legatee, who became bankrupt — upon which the executor filed a bill against the assignees for an allowance to be made to him out of the legacy, on account of the money which the bankrupt owed him, — the Court decided, that a legacy due from an executor (who admits assets) is in equity a debt due from the executor, and in this case allowed the set-off. (4) So, an executor may set off a debt due to the testator against a legacy bequeathed to the bankrupt; for when the assignees bring their bill against the executor, they can only stand in the place of the legatee, and can have no better right than what the legatee himself possessed. (5)

*Executors.*

(1) *Staniforth v. Fellowes*, 1 Marsh. 184.; and see *Thomason v. Frere*, 10 East, 418.

(2) *Bishop v. Church*, 3 Atk. 591.; and see Willes, 103. for cases which determine, that a debt, accruing to a party in the lifetime of the testator, cannot be set off

by him against a debt accruing to the executor. See also *Shipman v. Thomas*, 1 Esp. 240. Bull. N. P. 180.

(3) *Ibid.*

(4) *Jeffs v. Wood*, 2 P. Wms. 128.

(5) *Ibid.*

*Particular  
persons.*

Trustees.

A debt due from the bankrupt to a *trustee*, on account of his *trust*, cannot be set off by the trustee against a debt due from him in his *own right*. Therefore, where third persons holding the acceptance of a trader (who was known to be then in bad circumstances) agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due) — but without communicating to the trader that they were the holders of his acceptance — and the goods were purchased by the defendants according to the mode agreed upon; — it was held, that the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance; as they did not hold it in their *own right*, but in effect as trustees for the persons who had indorsed it to them for the above-mentioned purpose. (1) This case was decided on the ground of fraud, — and that the defendants were not the *bonâ fide* holders of the bill, but had lent themselves improperly to the real owners, to obtain for the latter a right of set-off. Where, however, a creditor buys goods of his debtor in the ordinary mode of business, though the contract be to pay for the goods in ready money, the creditor will then not be prevented from setting off his debt against the price of the goods. (2) If an action be commenced by a trustee in right of his trust, the defendant may set off a debt due to him from the *cestui que trust*. (3)

Directors  
of a pub-  
lic com-  
pany.

The directors, or trustees, of a *public company* incorporated by act of parliament, cannot set off a debt due to them from the bankrupt for a loan of money before his bankruptcy, against a demand made upon them by the

(1) *Fair v. M'Iver*, 16 East, 130.

(2) *Eland v. Karr*, 1 East, 375.

(3) *Bottomley v. Brook*, Whitm.

B. L. 204. *Rudge v. Birch*, *ibid*.  
*Webster v. Scoles*, *ibid*.

assignees for the amount of the stock held by the bankrupt, the loan not being made on the credit of the stock; for it was considered, that the bankrupt was indebted to them upon the loan as *private* persons, and that the stock was due to him from the company in their *corporate* capacity: it was considered, also, that the company could have no lien upon the stock, having no such special property in it as could give them a lien; for they were vested with the stock in their *corporate* capacity only, and for the particular purposes directed by the act; but the specific stock of each proprietor was vested in himself alone. (1) But where there was an express bye-law subjecting the stock of each member of a company to be distrained for such debts as he should owe them, and the bankrupt was indebted to them for a balance in his hands as their banker, or cashier, — the company was allowed in this case to set off the debt, against the stock and dividends belonging (2) to the bankrupt. So, also, where a director of a public company assigned his salary and share to the company, in order to secure a debt due from him to them on his private account, and empowered the company to direct the treasurer to retain his salary and dividends, and sell his shares for the payment of the debt — but the power given to the company had not been exercised, and the shares still remained in the director's name, — it was held, that though the shares on his bankruptcy passed to his assignees, as being in his order and disposition, yet that the company had a right of set-off for the dividends and salary due to him at his bankruptcy. (3)

*Particular persons.*

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A debt owing by the bankrupt *to the wife, dum sola*, cannot be set off against a debt due from the *husband*. (4) And it has been decided also upon the general statute of set-off, that a debt due *from the wife, dum sola*, cannot be

Debt due to or from the wife, *dum sola*, cannot be set

(1) *Meghioruchi v. Royal Exchange Assurance Company*, 1 Eq. Ca. Ab. 9.

(2) *Gibson v. Hudson's Bay Company*, 1 Str. 645.

(3) *Nelson v. London Assurance Company*, 2 Sim. & S. 292.

(4) *Ex parte Blagden*, 2 Rose, 249. 19 Ves. 465. *Paynton v. Walker*, B. N. P. 179.

**Particular persons.**

off in an action by or against the husband.

Legacy to the wife.

set off in an action brought by the husband alone — unless, indeed, he has promised to pay the debt after marriage, and thereby made it his own. (1) But where a legacy was given to the wife of a bankrupt, and she died without asserting any claim to it, — the Court held, that as at law a legacy to the wife is a legacy to the husband (though subject in equity to her right to a provision) — this legacy, being discharged of that equity in consequence of her death, would have become the absolute property of the husband if there had been no bankruptcy: that, as against the husband, the executor would have had a right to satisfy the legacy, by writing off so much of the debts due from the husband: and that he must have the same right against the assignees. (2) And, in a subsequent case of this description, the executors were allowed to set off a debt due from the bankrupt to the testator, against a moiety of a legacy given to the wife — the other moiety being ordered to be settled on the wife for life, with remainder to the issue of the marriage. (3)

**Insurance broker.**

The right of a *broker*, who effects a policy of insurance, to set off the money due for losses or returns of premium against the claim of the assignees of the underwriter, depends in a great measure upon the fact, whether or not the broker receives a *del credere* commission — and whether he effects the policy in his *own name*, or in that of his principal. If a broker acting under a *del credere* commission effects the policy in his *own name*, the right of set-off is allowed; for a commission *del credere* being an absolute engagement to the principal from the broker, and rendering him liable at all events, places the broker himself in the nature of a principal as to the underwriter, and clothes him with all the rights of the principal, unless the latter steps in between him and the underwriter. (4) And the same is also held

(1) *Wood v. Akers*, 2 Esp. 594. J. 34.; but see *Carr v. Taylor*,

(2) *Ranking v. Barnard*, 5 Mad. 10 Ves. 578.

32. (4) *Grove v. Dubois*, 1 T.R. 112.

(3) *Ex parte O'Farrell*, 1 G. & Bize v. Dickason, *ibid.* 287.

under the general statutes of set-off.(1) But where the broker does *not* act under a *del credere* commission, he is then not entitled to such right of set-off; for, in this case, the losses or the returns of premium are a debt properly due to the assured; and the broker, even with respect to the underwriter, can only be considered as an agent, whose authority (by the bankruptcy of the underwriter) is virtually countermanded and extinct. Therefore, where a broker (without such a commission) was indebted to an underwriter for premiums due upon policies subscribed by him before his bankruptcy, he was held to be not entitled to set off against the assignees of the underwriter returns of premium due upon the arrival of ships, whether the ships arrived before (2), or subsequent to the bankruptcy. (3) The Court of Common Pleas in these two cases (contrary to the opinion of the Court of King's Bench (4), which considered the broker, as to a return of premium, a sort of stakeholder between the underwriter and the assured) treated the return of premium as a contingent debt, due from the underwriter *to the assured* — and the broker, as merely the agent of the underwriter to receive the premium for him, and for nothing else — holding, therefore, that the broker could not, after the underwriter's bankruptcy, make himself the agent of the assignees, for the purpose of detaining money to be paid by the underwriter to the assured. (5) And even where the broker acts under a *del credere* commission, yet if he discloses the name of his principal to the underwriter, he will not then be entitled to this right of set-off. (6)

*Particular persons.*

A broker, however, may have the same right of set-off by virtue of a *lien* (7), as that which he possesses by virtue of

Broker's set-off in respect of a *lien*.

(1) *Weinholt v. Roberts*, 2 Camp. 586.

(2) *Minett v. Forrester*, 4 Taunt. 541.

(3) *Goldschmidt v. Lyon*, 4 Taunt. 534.

(4) *Shee v. Clarkson*, 12 East, 507.

(5) Per Mansfield C.J., 4 Taunt. 544.

(6) *Koster v. Fason*, 2 M. & S. 112. *Morris v. Cleasby*, 1 M. & S. 576. 4 M. & S. 560. *Peele v. Northcote*, 7 Taunt. 478.

(7) And see ante, 701.

*Particular  
persons.*

a commission *del credere* — as where, for instance, he acquires an interest by making advances to his principal on the credit of a particular consignment of goods. Therefore, where brokers (not acting under a commission *del credere*) effected policies on account of their principal, but in their own names, and accepted bills drawn on them on account of goods consigned to them, which were lost before their arrival, — it was held, that the brokers might set off the amount of such losses, against the claim of the assignees of the underwriter for the premiums due, in respect of his subscription to the policies of insurance on the goods. So, as we have already seen (1), a broker *entrusted* by his principal with a policy to receive an average loss under it, though he receive it after the bankruptcy of his principal, has a right, by reason of his *lien* on the policy, to set off money due to him from the bankrupt for premiums, against the money he received from the underwriters (2); and that the receipt of the average loss *after* the bankruptcy was no objection to his right of set-off; as the debt was *due* to the bankrupt *before* the bankruptcy, though not ascertained till afterwards. And, indeed, in all cases of *mutual trust and credit* (as has been before observed) — where the trust or credit *must terminate in a debt* — any other person, as well as a broker, has a right of set-off under the statute, in respect of a balance due to him from the bankrupt. (3)

Under-  
writer.

With respect to the right of set-off by an *underwriter* against the assured — it is now settled by the unanimous decision of the twelve judges (though the point was shortly before decided differently in the Common Pleas (4)) — that an *underwriter* may set off, against the assignees of the assured, the amount of premiums due to him *before* the bankruptcy, against a loss accruing *after* the bankruptcy. The case was argued as one of mutual credit under the

(1) Ante, 705.

(2) *Whitehead v. Vaughan*, ante, 705.

(3) See ante, 706.

(4) *Glennie v. Edmunds*, 4 Taunt. 775.



5 G. 2. c. 30: s. 28.; but the decision of the Judges proceeded on the equitable construction of the 19 G. 2. c. 32. s. 2. (which is now incorporated in the 53d section of the new act) enabling the assured, under a commission of bankrupt against an underwriter, to *claim before* the happening of a loss, and *after* a loss to *prove* and receive a dividend. And the Judges were of opinion — that, as under this statute the set-off was to be allowed to the *assured*, in the case of a bankrupt underwriter—so, by parity of reasoning, there ought to be the same allowance to the underwriter, in the case of a bankrupt (1) assured. But an underwriter cannot set off a general balance due to himself from the broker, at the time of the adjustment of a loss, against the claim of the assured. Therefore, where a broker became bankrupt after the adjustment of a loss with the underwriter, though he had upon that occasion struck the underwriter's name out of the policy and the adjustment, in consideration of the balance which he himself owed the underwriter, — yet the latter was held to have no right of set-off, in an action brought against him by the assured, beyond that which was due to him for premiums on the particular policy. (2)

*Particular persons.*

For the same reason as applies to the case of a broker (3) — so, where a *factor* acts under a *del credere* commission, and sells goods in his *own name*, concealing the name of his principal, the person dealing with him has a right to consider him to all intents and purposes as the principal; and though the real principal may afterwards appear, and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal (4); and may also plead these facts specially, in support of his right of set-off against the demand of the prin-

Factor.

(1) *Graham v. Russell*, 2 Marsh. 561. 5 M. & S. 498.

(2) *Todd v. Reed*, 3 Star. 16.

(3) Ante, 714.

(4) *Rabone v. Williams*, 7 T. R. 360. in note. *George v. Clagett*, 7 T. R. 359. *Escot v. Milward*, ibid. C. B. L. 378.

*Particular  
persons.*

cipal. (1) By the recent statute of the 6 G. 4. c. 94., which enables a factor to *pledge* goods deposited with him by his principal, the person (with whom any goods shall have been so pledged) has a right of set-off against the owner, to the amount of the money advanced upon the goods; and the real owner redeeming the goods is entitled, in case of the bankruptcy of the factor, to set off (2) the amount paid by him for their redemption, against any debt due from him to the factor. .

Banker.

If a *banker* receives and pays money on account of a bankrupt *after notice* of his bankruptcy, he cannot set off the payments against the receipts, in an action by the assignees. (3)

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## SECTION V.

### *Of Set-off on Bills and Notes.*

Indorsee  
of a bill.

With respect to the right of an *indorsee* to set off a bill of exchange, or promissory note, against the debt owing by him to the bankrupt, a distinction is taken between a bill indorsed *before*, and one indorsed *after*, the bankruptcy. A bill indorsed *before* the bankruptcy, we have seen (4), can be set off against a debt accruing from the indorsee to the bankrupt after the indorsement; for, though the bankrupt might not know when the bill was indorsed to, or came to the possession of the party, yet the bankrupt by sending a bill into the world with his name upon it, gains a credit from every person who takes it afterwards. But a bill indorsed *after* the bankruptcy cannot be set off; for, notwithstanding the debt (as against the bankrupt) may have existed before the bankruptcy (5), it is not a debt due from him to the

(1) *Carr v. Hinckliff*, 4 B. & C. 547.

(2) *Section 6.*; and see ante, 462. 480.

(3) *Vernon v. Hankey*, 2 T. R. 113. 3 Bro. 513.

(4) *Ante*, 708.

(5) *Marsh v. Chambers*, 3 Str. 1234.

*Bills and  
notes.*  
\_\_\_\_\_

same party as at the time of the bankruptcy; and though it is allowed to be proved, yet the right of proof is very different from the right of set-off. By the former no *new* charge is brought upon the estate; but that is not the case in the latter instance; and a creditor, it has been said, has no right thus to vary the relation in which he stood to the bankrupt's estate at the time of the bankruptcy, by a transaction *ex post facto* with a third party, and thereby put himself in a better situation than the rest of the bankrupt's creditors. (1) And even where a party, who had indorsed the bill *before* the bankruptcy of the acceptor, was obliged to take it up *afterwards* in consequence of the acceptor's bankruptcy, Lord Loughborough held that he could not *set off* the bill against a debt due to the bankrupt's estate — though he might *prove* the amount under the commission. (2) It is incumbent, also, on the *indorsee* to show that the indorsement was made *before* the bankruptcy; for a case of set-off is in the nature of a cross action, in which the party would be obliged to prove every thing necessary to substantiate his demand; and the time, when the bill was indorsed, would be a material fact in support of his case. (3) Thus, in an action brought by the assignees of a country banker, the defendant cannot set off cash notes payable to bearer and issued by the bankrupt *before* his bankruptcy, unless the defendant shows that such notes also came to his hands *before* the bankruptcy. (4) But proof, that notes to the *amount* of the set-off claimed came into the defendant's hands three or four weeks *before* the bankruptcy, is sufficient evidence for the jury to presume possession of them, without actually identifying them at the time of the bankruptcy. (5)

In a case of cross-acceptances, — in order to enable the holder of the bankrupt's acceptances to avail himself of

Cross-ac-  
ceptances.

(1) Cullen's B. L. 205.; and see *Evans v. Prosser*, 3 T. R. 186.

(2) *Ex parte Hale*, 3 Ves. 304.

(3) *Lucas v. Marsh*, Barnes, 453.  
*Jackson v. Evans*, 6 T. R. 57.

(4) *Ibid.*

(5) *Moore v. Wright*, 2 Marsh. 209.

*Bills and notes.*

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them (in an action by the assignees against himself on his own acceptances) by way either of set-off or mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bills so sought to be set off subsisted *before* the bankruptcy, or that there was a *mutual credit* created in the *origin* of the bills. (1) An acceptance, though not due until after the bankruptcy of the drawer, it has been already observed (2), may be set off against a debt due from the acceptor to the drawer. (3)

Set-off by acceptor against drawer, where acceptor had paid a composition on the bills to the holders.

Where an agent of the bankrupt (being provided with funds for that purpose) accepted bills drawn by the bankrupt, who paid them away to his creditors — and the holders of the bills, after they became due and before the act of bankruptcy, in order to relieve the acceptor from his responsibility to them, took from him a composition of 10s. in the pound; and delivered up the bills to the acceptor; — it was held, that as the bankrupt's estate was discharged against any claim of the bill-holders by such composition, the acceptor had a right to set off the *full amount* of the bills against any claim of the assignees — the transaction being considered, in law, a payment of the whole amount of the bills by the acceptor, and a gift by the holders to the acceptor of the difference between what was actually paid, and the amount of the bills. (4)

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## SECTION VI.

### *Of an equitable Set-off.*

As the Lord Chancellor in Bankruptcy exercises an *equitable*, as well as a *legal* jurisdiction, he will extend that jurisdiction to cases of set-off, that are not within the imme-

(1) *Ouchterlony v. Easterby*, 4 Taunt. 888.

(2) *Ante*, 706.

(3) *Ex parte Wagstaff*, 13 Ves. 65.

(4) *Stonehouse v. Read*, 3 B. & C. 669.

diate operation of the statute, upon the same principle as where there are mutual demands between parties, which cannot be made the subject of set-off at law, a court of equity will frequently interpose between the parties upon equitable principles, and determine what is justly due from one party to the other. (1) As where a contract was entered into, upon which one of the parties had taken usurious interest, — though a party to such a contract could not have enforced it, or set off the sum due upon it *at law*, Lord Hardwicke permitted the sum really advanced upon it to be set off in account in a suit of equity. (2)

Equitable.

On an usurious contract.

So where a lady directed her bankers to sell certain exchequer annuities, and to invest the produce in navy annuities, and the bankers informed her that they had followed her directions, and an entry was made in her banking book, in which credit was given to her regularly for the dividends: — several years afterwards her brother, having a separate account with the bankers, proposed to borrow of them 1000*l.*, upon the security of the joint and several note of himself and his sister, which was agreed to, and the note given accordingly: — the bankers became bankrupt; and it then appeared that they had not purchased the navy annuities, and that the documents which they had exhibited to the petitioner were false: — the assignees of the bankers brought an action against the brother *alone* upon the note, upon which the brother and sister petitioned to be at liberty to set off the debt due from the bankers to the sister against what was due to them upon the note; — and Lord Eldon, upon the ground of the *fraud* practised upon the sister, restrained the assignees from proceeding at law, and ordered the set-off as prayed for. (3) When this case, however, was subsequently cited as an authority, Lord Eldon observed, that there were certain difficulties in the decision

Set off of separate debt against a joint and several one on the ground of fraud.

(1) *Dinwiddie v. Bailey*, 6 Ves. 136. *Townrow v. Benson*, 3 Mad. 203. *James v. Kynner*, 5 Ves. 108. (2) *Ryall v. Rowles*, 1 Ves. 375. (3) *Ex parte Stephens*, 11 Ves. 24.

**Equitable:** of it: and that but for the fraud, he should have doubted much whether his decision was right. (1)

The like  
against a  
joint debt,  
to prevent  
circuity.

But although there can in general be no set-off (as we have already seen (2)) between joint and separate debts, yet upon equitable principles, and independently of any case of fraud, such a set-off, in order to prevent circuity, will be occasionally allowed. Thus, where A. (upon entering into partnership with B.) applied to his bankers for a loan to constitute his capital, to which they consented, upon condition that B. should join in a security for the repayment of the loan — and A. and B. accordingly gave the bankers their joint and several bond: — the partnership opened a joint account with the bankers, who also continued the private bankers of A.: — the bankers became bankrupt, when the balance on the *joint* account, arising from this loan, was *against* A. and B., but A.'s *private* account was in *his favour*; — under these circumstances, A. and B. were allowed to set off this private balance due to A., against the joint debt due from them both to the bankers; for though A. could not at law have pleaded a set-off of this private balance due to him alone, in an action brought against him and B. jointly on the bond, yet the moment the bankers obtained judgment, A. could have then brought his action against them for his separate debt; and if B., the surety, had paid the joint debt, A. would, of course, have then repaid him by the money recovered in that action; consequently, the joint debt due from A. and B. on the bond was nothing more, as Lord Eldon observed, than a security for the separate debt of A.; and upon equitable consideration, a creditor, who has a joint security for a separate debt, cannot resort to that security, without allowing what he has received on the separate account, in respect of which the joint security was given. (3)

(1) *Ex parte Blagden*, 2 Rose, 251. 19 Ves. 467.

(2) See ante, section 3.

(3) *Ex parte Hanson*, 12 Ves. 346. 18 Ves. 252. 1 Rose, 156.: and see *Pulliamy v. Noble*, 3 Meriv. 618.

Upon the same principle, where two partners gave a joint and several bond to a creditor, who afterwards became indebted to A. (one of the partners); and B., the other partner, becoming bankrupt, the creditor proved the bond under B.'s commission, and then brought a joint action against A. and B., to which B. pleaded his certificate, — an injunction was granted to restrain the creditor from proceeding in the action, which being a joint one, A. would have been precluded at law from setting off the separate debt due to himself. (1)

*Equitable.*

Creditor restrained from proceeding in a joint action, without allowing a set-off on a separate debt.

Where it was agreed between A. resident in London, and B. who resided in the West Indies, that A. should accept bills drawn upon him by B. to a specific amount, upon A.'s having bills of lading filled up to his order for colonial produce — and that after deducting A.'s advances, &c. the balance was to be paid to C., for whom B. acted as agent in the West Indies: — B. accordingly shipped goods with a bill of lading filled up to B.'s order, previous to the arrival of which C. became a bankrupt: — the captain refusing to deliver the goods to A., the latter was obliged to sue him in trover, and the cause was referred to arbitration: — in an action by the assignees of C. against A. for the balance of the proceeds of the goods, it was held, that A. was entitled to set off against such balance the costs of the reference, as well as the costs of the cause; for that being authorized by the bill of lading to act for the benefit of all concerned, and to do all that was necessary to obtain possession of the goods, there was nothing to show, that a reference was an improper step to effect that object. (2)

Set-off of costs of a reference.

*Costs in equity*, which before the new act could not be proved under a commission against a party, unless they were taxed (3) before the bankruptcy, could still less be the subject of set-off. (4) But as the 58th section now enables

Costs in equity.

(1) *Bradley v. Millar*, 1 Rose, 3.

(5) *Ex parte Sneaps*, C. B. L. 192. *Rex v. Davis*, 9 East, 320.

(2) *Curtis v. Barclay*, 5 B. & C. 1.

(4) *Ex parte Thomas*, 15 Ves. 539.

**Accounts.**

a party, who has in any suit at law or *in equity*, or in any proceeding in bankruptcy or lunacy, obtained a judgment, decree, or order, for any debt or demand proveable under the commission, to *prove* also for the costs, although *not taxed* at the time of the bankruptcy; — so, it is apprehended, he will now be permitted to set off such costs against any demand of the assignees.

## SECTION VII.

*Of the Mode of balancing the Accounts.*

Whether  
an account  
can be dis-  
puted,  
after set-  
off allowed  
by the  
commis-  
sioners.

In cases of mutual credit between the bankrupt and persons who have dealt with him before his bankruptcy, there are two modes by which the accounts may be balanced, viz. either by the (1) commissioners, as directed by the statute, or upon the trial of an action at law. When a debt has once been liquidated before the commissioners, Lord Mansfield held, that it could only afterwards be litigated by an application to the Great Seal — the only way to question the proof of a debt being by petition to the Lord Chancellor. (2) But where assignees brought an action against a defendant, who pleaded a set-off that covered the whole demand claimed by the assignees, and tendered the proof of a debt before the commissioners, as evidence of the subject matter of the set-off, — Lord Ellenborough refused to receive it, saying that the commissioners could neither be considered as having done a binding judicial act, nor as having represented the assignees, and thus assented to the defendant's demand; and that it would only be sufficient evidence against the assignees, if it could be

(1) The 4 & 5 Ann. c. 17. enabled the ASSIGNEES as well as the commissioners, to balance the accounts. The 5 G. 1. c. 11. omitted the assignees; the 5 G. 2. c. 30.

included them again; but the new statute once more confines the power to the commissioners.

(2) *Brown v. Bullen*, Doug. 407.



shown that *they acknowledged* that the proof was just. (1) Accounts.  
In such a case, however, the Lord Chancellor, if he thinks the set-off ought to be allowed, will (as he did in this) upon petition grant an injunction to restrain the assignees from further proceedings at law. (2)

In balancing the accounts, Lord Hardwicke held, that where debts carried interest, the commissioners ought to stop interest on both sides of the account at the time of the bankruptcy: or to compute it on both sides till the final settling of the account. (3) This rule has been objected to by a learned writer (4) on bankruptcy; but it does not appear by any subsequent decision to have been departed from.

(1) *Pirie v. Mennett*, 3 Camp. 279.

(2) *Ex parte Mennett*, 1 Rose, 395.

(3) 1 Atk. 80.

(4) See Christian's B. L. Vol. I. 524. where it is contended, that Lord Hardwicke's rule ought only to be adopted, when the balance is in favour of the bankrupt's estate, and not where it is the other way.

## CHAP. XVIII.

OF SUITS AT LAW AND IN EQUITY BY AND AGAINST THE  
ASSIGNEES.SECT. 1. *Of Suits in Equity.*2. *Of Actions at Law; and herein of Proceedings  
against the Sheriff.*3. *Effect of the Bankruptcy upon Suits previously  
commenced by the Bankrupt.*

## SECTION I.

*Of Suits in Equity.*

It is not the purpose of this chapter to consider every case, in which the assignees may have a *right* of action, or suit, against persons in possession of the bankrupt's property; that inquiry, as it is conceived, more properly appertaining to the division of a former chapter (1), in which all the various species of property passing to the assignees by virtue of the assignment, and the different circumstances under which they can claim it, have been already fully considered. The object we have now in view is, therefore, to treat more particularly of the *forms and proceedings* which the assignees must adopt in the exercise of their right, in order to recover the different kinds of property which the bankrupt was previously entitled to; — or which he would have been entitled to, if he had not become bankrupt.

The whole of the bankrupt's estate being vested in the assignees by the assignment as fully as it was in the bankrupt himself, they have the same remedies to recover it either by

(1) Chapter XI.

suit or action (1) — with this exception, however, that they are by the 88<sup>th</sup> section restrained from commencing *suits in equity* without the consent of the major part in value of the creditors (who have proved under the commission) present at some meeting, of the purport whereof twenty-one days' notice shall have been given in the London Gazette; or if one third in value of such creditors shall not attend at such meeting, then the assignees must procure the consent in writing of the commissioners. And the same previous consent, we have before seen (2), is necessary to enable them to compound any debt, or to submit any dispute to arbitration.

Cannot be commenced without consent of creditors;

Creditors cannot give the assignees a *general* power to prosecute suits, or submit matters to arbitration at their own discretion; but there must be a *meeting* of creditors as directed by the statute, to consider of *each particular suit*, or case for arbitration. (3) But when the meeting is properly advertised, the majority in value of the creditors present have a right to bind those who are absent. (4)

but they cannot give assignees a general power. Majority present binding.

If the assignees, without the consent of the creditors regularly obtained in the manner before mentioned, take upon themselves to file a bill against any person, the defendant may plead that the suit was not instituted with the consent of the creditors at a meeting pursuant to the requisitions of the statute. (5)

When assignees sue without consent.

Where the majority in value of the creditors refuse to permit the assignees to institute a suit in equity, it has been held, that any creditor may in that case bring one, but at the peril of costs. (6) Thus, where the majority of creditors had dissented from bringing a suit to redeem a lease, and the other creditors filed a bill against the mortgagee and the assignees for that purpose, — redemption was

When creditors refuse to assent.

(1) Bl. Com. 485. *Hussey v. Fiddall*, 6 Mod. 324. 3 Salk. 59.

(2) *Ante*, 323.

(3) *Ex parte Whitchurch*, 1 Atk.

2.

(4) *Cooper v. Pepys*, 1 Atk. 106.

(5) *Ocklestone v. Benson*, 2 Sim. & S. 265.

(6) *Franklyn v. Fenn*, Barnard. Rep. 30.

accordingly decreed (1); and it was said, that this was like the case of an executor, who being the proper party to get in the estate, the Court will not in general suffer the creditors of the testator to file a bill in equity to get it in; but that if collusion is charged, it is otherwise. (2)

When  
consent  
not requi-  
site.

If the interests, however, of the creditors are not affected — as if the object of the suit by the assignees is to enforce a mere *personal claim* of indemnity, then the consent of the creditors will not be necessary to the institution of the suit.

All the as-  
signees  
need not  
sue.

Nor need *all* the assignees be plaintiffs; for if any refuse to join in the suit, they may be made defendants (3); and the others would not be prevented from asserting their rights.

Bankrupt  
need not  
be made a  
party to  
the suit.

It is not, now, necessary, that a bankrupt should be made a party to a bill against his assignees (4); though the contrary was formerly held. (5) But, though it is not *necessary* that the bankrupt should be joined in the suit, it is not a ground of demurrer if he is made a party to it, more especially when he is charged as a confederate in a fraud. As where a bill was filed against a bankrupt and his assignees, stating a fraudulent bankruptcy concerted to defeat the plaintiff's execution, and praying a discovery and an injunction against an action threatened by the assignees — and the bankrupt demurred, alleging that he was not concerned in the suit, and that the discovery was matter of evidence between the plaintiff and the other defendants, to which he might be examined as a witness; — Lord Loughborough said, there was no pretence for the demurrer, which was accordingly overruled. (6) And it seems to be generally understood, that if any *discovery* is sought of the bankrupt's conduct *before* he became

(1) Ibid.

(2) See the cases on this subject collected in the notes to the case of *Elmslie v. M'Aulay*, 3 Bro. C. C. 624. Eden's edition.

(3) *Wilkins v. Fry*, 1 Meriv. 1. 2 Rose, 371.

(4) *Degolls v. Ward*, 2 P. Wms.

311. note. *Collet v. Wollaston*, 3 Bro. 228. *Griffin v. Archer*, cit. 2 Ves. jun. 645. *Whitworth v. Davis*, 1 Ves. & B. 545. *Lloyd v. Lander*, 5 Mad. 282.

(5) *Sharp v. Gamon*, 2 Vern. 52.

(6) *King v. Martin*, 2 Ves. jun.

641.

bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof; though his answer cannot be read against his assignees. (1)

Where a mortgagor becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the Court will not, on the application of the assignees alone, make an immediate decree under the 7 G. 2. c. 20. (2)

Where a bill was filed by a creditor (upon a debt accruing *after* the bankruptcy) against the assignees, as well as the executor of the bankrupt, for an account (on the ground of there being a surplus), and to restrain the assignees from paying the surplus to the executor, and the assignees demurred to the bill; —the demurrer in this case was allowed, as the executor only was liable to the creditor, and the assignees to the executor. (3)

Upon a bill filed by the assignees for the discovery of a bankrupt's effects, the defendants will not be permitted to look into their depositions taken before the commissioners, to assist them in putting in their answer. (4)

In case of the death, or removal, of the assignees, the new assignees were obliged before the recent statute, to file a supplemental bill to entitle them to the benefit of the proceedings in a suit begun by the former assignees; for in a case of this kind, where other assignees were by order of court put into the room of those who were dead or discharged, it was held, that there was no privity between the bankrupt and the new assignees; or, at least, but an artificial one, and therefore that they could file no bill of revivor. (5) But now by the 67th section of the new statute, whenever an assignee dies, or a new assignee is chosen in the manner specified in the act, no action at law or suit in equity shall be thereby abated; but the Court may, upon the sug-

Bill of foreclosure against a bankrupt mortgagor. Bill filed by a creditor on a debt *after* the bankruptcy.

When defendants not permitted to refer to their depositions. Suits will not abate by the death, or removal of assignees.

(1) Mitford on Pleading, 142.

(2) *Garth v. Thomas*, 2 Sim. & 2 Ves. jun. 95.

St. 188.

(3) *Utterson v. Mair*, 4 Bro. 270.

(4) *Boden v. Dellow*, 1 Atk. 288.

(5) *Anon.* 1 Atk. 88.

gestion of such death, or removal, and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same.

How assignees of one partner may sue.

And by *section 89.* in any commission against one or more of the members of a partnership, the assignees may, upon obtaining the order of the Lord Chancellor, prosecute any suit or action in the names of such assignees, and of the remaining partner or partners against any debtor of the partnership; and may obtain such judgment, decree, or order, as if the action or suit had been instituted with the consent of the other partners.

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## SECTION II.

### *Of Actions at Law, and herein of Proceedings against the Sheriff.*

Assignees may sue in their own names;

The 63*d* section of the new statute, as we have already seen (1), has given the commissioners power to assign (among the bankrupt's other property) all *debts* due to him; which are declared to vest in the assignees as fully, as if the assurance whereby they may be secured had been made to the assignees themselves; and it has also given them the like remedy to recover the debts in *their own names*, as the bankrupt himself might have had. This is a peculiar privilege possessed by the *assignees of a bankrupt*; for every *other* assignee of a debt is obliged at law to sue for the recovery of it in the name of the assignor. (2)

(1) Ante, 385.

(2) In like manner a trustee under the Scotch bankrupt act (the 54 G. 3. c. 137.) cannot in an English court of law sue in his own

name for a *close in action*, that statute conveying only a right of *property* to the trustee, and not a right of suit. *Jeffery v. M<sup>r</sup> Taggart*, 6 M. & S. 126.

If, however, a bond is made to a *trustee* in trust for the bankrupt, the assignees cannot then bring the action in their own names, but must, in such a case, sue in the name of the trustee. (1)

except when.

One of several assignees may hold the defendant to bail on an affidavit of the debt, stating it to be due from the defendant, "as appears by the bankrupt's books, and as the defendant believes." But in every affidavit to hold to bail made by an assignee, a tender in bank notes must be negatived, as in ordinary cases. (2)

Affidavit of debt.

In actions at law by the assignees, whenever the contract is made by the bankrupt *before* his bankruptcy, they *must* state themselves in the declaration to be *assignees*; but if the contract is made by the bankrupt *after* the commission, they *need not* then name themselves assignees in the declaration (3); for when the bankrupt sells or makes any contract respecting property *after* the commission, the assignees may in that case treat him as their agent—being, in this respect, in the situation of executors, who sell goods after the death of their testator. And in one case, where an action was brought by assignees to recover back money paid by the bankrupt *before the commission* was opened, but *after the act of bankruptcy*, Baron Wood thought that it was *not necessary* for them to declare *as assignees*, though he acknowledged that to be the usual way. (4)

When they must declare as assignees.

Assignees under a *joint commission* against A. and B., in suing on a *separate* contract entered into with A., may describe themselves generally as the *assignees of A.*, without noticing the name of B. (5)

Assignees under joint commission suing on a separate contract.

But assignees under *three separate commissions* cannot properly sue as *joint assignees*, but must state their respective interests in the declaration (6); though this would

Assignees under three sepa-

(1) *Ex parte Coysegame*, 1 Atk.

(4) *Thomas v. Riding*, Wightw. Rep. 65. 1 Rose, 121.

(2) *Smith v. Barclay*, 3 Bos. & 219.

(5) *Stonehouse v. De Silva*, 3 Camp. 399. *Harvey v. Morgan*, 2 Star. 17.

(3) *Evans v. Mann*, Cowp. 569.

(6) *Ray v. Davis*, 2 Moore, 3.

rate commissions.

be good after verdict, if there was nothing to shew by the record, that they did not claim under a joint commission. (1)

Variance.

Where in an action by plaintiffs, as the assignees of C. and E., they were described in a notice to produce a document as assignees of C. and D., this was held to be bad, although the plaintiffs were in fact the assignees of C. and D. (2)

Non-joinder.

The non-joinder of a joint assignee is a ground of nonsuit upon the trial, under a plea of the general issue, and need not be pleaded. (3)

Need not set forth commission, &c.

The assignees need not set forth in the declaration the commission and proceedings at large, or how the party became a bankrupt, but may declare shortly. (4) And they may sue both in the *debet and detinet*, as the whole property of the bankrupt is vested in them by law : and a proceeding by a *scire facias* is the same in this respect, as if they proceeded in a common form of action. (5)

Where assignees may bring either *trover* or *assumpsit*.

It seems to have been formerly held, that if *after an act of bankruptcy* the bankrupt paid money, or delivered goods, to any person, the assignees could not declare in *assumpsit*, but were obliged to proceed in *trespass or trover* for the tort. (6) But it was afterwards finally settled, that whoever takes the bankrupt's goods and converts them into money is supposed, in justice, to receive the money for the use of the assignees (in whom the property of the goods by law is vested)—and to promise to pay it to their use ; and that the law in this instance implies a privity of contract between the persons, whose money it lawfully is, and the person who actually received it. (7) The assignees may therefore, in such a case, either affirm the contract and bring *indebitatus assumpsit* for the money — or disaffirm it and bring *trover* for the goods. (8) Thus, if a trader become bank-

(1) *Streatfield v. Halliday*, 2 T. R. 779.

(2) *Harvey v. Morgan*, 2 Star. 17.

(3) *Snelgrove v. Hunt*, 2 Star. 424.

(4) *Tully v. Sparkes*, Ld. R. 1546.  
*Winter v. Kretchman*, 2 T. R. 45.

(5) *Ibid.*

(6) Per Lord Hardwicke, *Bilton v. Hyde*, 1 Ves. 329.

(7) *Kitchen v. Campbell*, 3 Wils. 308. 2 Bl. 827.

(8) *Hussey v. Fiddall*, 12 Mod. 324. 3 Salk. 59. *Read v. Vaughan*, 7 Mod. 461. *Kitchen v. Campbell*, supra. *Read v. James*, 1 Star. 134.



rupt by lying in prison after an arrest, and a broker (having notice that a commission would be issued against him) sell the bankrupt's goods, and pay him the produce before the period of imprisonment is completed to constitute the act of bankruptcy, — the assignees may, in this case, maintain either *trover* or *assumpsit* against the broker. (1) So, where a defendant took the goods of the bankrupt in execution after an act of bankruptcy, and then got possession of them under a bill of sale from the sheriff, — Lord Ellenborough held, that the assignees were entitled to recover against the defendant in an action for *money had and received*, though no money was actually paid to him, and though *trover* would have been the preferable remedy. (2)

*Trover or  
assumpsit.*

When the assignees seek to recover goods in *disaffirmance* of the bankrupt's acts, they must shew not only that the property in the goods *once vested* in the bankrupt, but must also give evidence to *avoid* the acts of the bankrupt, as to the disposal of the goods. If they bring *trover*, they may recover the full value of the goods; but if they bring *assumpsit*, they can then only recover what the goods actually sold for, or what the party actually received; and in the latter form of action, also, which operates as an affirmance of the contract by the assignee, the defendant will have the right of setting off any debt due to him from the bankrupt. (3)

Distinction between these two forms of action.

After the assignees, however, have once elected to bring either *trover* or *assumpsit*, if they *proceed to judgment* in the action so brought, they cannot afterwards adopt the other form of action; for a judgment in *trover* may be pleaded *in bar* to an action of *assumpsit* for the same goods (4); since, though the actions are grounded on different writs, the *cause* of action is the same in each. A judgment of *nonsuit*, however, in one action would not preclude them

When they have once elected.

(1) *King v. Leith*, 2 T. R. 141.

(3) *King v. Leith*, 2 T. R. 141.

(2) *Reed v. James*, 1 Star. Rep. 34.; but see *Walter v. Drakeford*, *id.* 482. and *Nightingale v. De-  
laine*, 5 Burr. 2589.

*Smith v. Hodson*, 4 T. R. 211.

(4) *Kitchen v. Campbell*, *supra*,  
*Hussey v. Fiddell*, *supra*.

**Trover.**

Cannot  
treat the  
same trans-  
action  
both as a  
contract,  
and a tort.

from bringing the other. (1) But they cannot affirm the same transaction in one part as a *contract*, and disaffirm it in another as a *tort*. Therefore, where a person after the bankruptcy received from the bankrupt's wife money of the bankrupt's, with which he bought South Sea bonds and delivered them to her, and the assignees seized some of the bonds as part of the bankrupt's estate; it was held, that they could not maintain *trover* against such person for the money, with which he purchased the remainder of the bonds, as the seizing of part of the bonds was an affirmation of the defendant's act in laying out the money. (2) So, where assignees recovered money from a banker paid by him upon the bankrupt's drafts after notice of the bankruptcy, they could not also maintain an action against the creditor, to whom the money was paid by the banker, though the banker had no other way of recovering the money back (3), than procuring the assignees to sue the creditors.

Where  
*trover* will  
not lie.

But although *trover* is in general, for the reasons above stated, the proper form of action when there is any fraud in the transaction which the assignees seek to impeach, yet there are many cases in which *trover* will not lie, and where the only remedy is an action of *assumpsit*. Thus, where a bankrupt *after* his bankruptcy gave a creditor a check upon his bankers, who paid the amount of it to the creditor,—it was held, that the assignees could not recover the money by an action of *trover* against the creditor for the check, as the action proceeded on the ground that the check was worth nothing — and assignees cannot sue for a void authority given by the bankrupt. (4) So, where a creditor (with the knowledge of the bankrupt's insolvency) prevailed on the bankrupt to sign bills drawn upon the bankrupt's debtors, on stamped paper produced by the

(1) *Nightingale v. Devine*, 5 Burr. 2589. (3) *Vernon v. Hanson*, 2 T. R. 287.  
*Walker v. Laing*, 1 Moore, 286. note. (4) *Mathew v. Sherwell*, 2 Taunt. 439.  
 (2) *Wilson v. Poulter*, 2 Str. 859.

creditor — and then induced the drawees (who were not *Trover.* aware of his circumstances) to accept them, — it was held, that trover would not lie by the assignees for the bills, there being no colour to say that either the bankrupt *before* his bankruptcy, or the assignees after the bankruptcy, had any property in them; but that their remedy was an action for money had and received against the defendant, when the bills were paid. (1)

So the assignees cannot maintain trover against a vendor, for goods contracted to be bought of him by the bankrupt, unless the bankrupt had the right of *possession*, as well as a right of *property* in the goods; and a vendee does not acquire a right of possession to goods bought — which are not delivered, and where nothing is said about any credit or time of payment — until he pays, or tenders, the price of the goods to the vendor. (2) And even where goods have been bought by the bankrupt at certain credit, and *part* of the price has been paid for them, but no notice was given to the persons (in whose warehouses they were deposited) to transfer them into the name of the bankrupt, — it was held, that the assignees could not maintain *trover* against the vendor for the goods, without tendering the remainder of the price — whatever right of action they might have had against the vendor for not returning the money, which had been paid in part of the price — or for selling the goods to other persons, when according to contract he might have no right to sell. (3)

Where, however, the bankrupt had advanced money on bills, and after an act of bankruptcy he sent the bills to the defendants, it was held, that trover in this case would lie by the assignees to recover the bills from the defendants. (4) And where, also, a bankrupt had assigned a policy of insurance to the defendant, which was afterwards discovered to be invalid, and the insurance company paid

Where  
not against  
a vendor  
of goods.

Where  
trover will  
lie.

(1) *Walker v. Laing*, 7 Taunt. 58.

(3) *Bloxam v. Morley*, *ibid.* 951.

(2) *Bloxam v. Sanders*, 4 B. & N.P. 382.

(4) *Wall v. Barnard*, 1 Carring. 941.

**Trover.** to the defendant half the sum insured as a gratuity on his giving up the policy, it was decided, that trover would lie, though the value of the parchment only, and not the sum gratuitously paid, was recoverable. (1) An action, indeed, for money had and received could not have been brought in this case; for no action will lie to recover from another what is paid to him as a *gratuity*. (2)

When necessary to prove a demand and refusal.

Where assignees bring *trover* for goods collusively sold by the bankrupt on the eve of bankruptcy, they must prove a demand and refusal in order to maintain the action (3); for the *selling* was not in itself unlawful, though the transaction might be liable to be impeached by the assignees. But where they bring *trover* for goods in the order and disposition of the bankrupt at the time of the bankruptcy, then no demand and refusal is necessary to support the action. (4) In *trover* also against a sheriff, or the party suing out the execution, *after* an act of bankruptcy (5), the assignees need not in this case prove an actual demand; because, the property being vested in them from the time of the bankruptcy, the execution is consequently tortious, and is in itself evidence of a conversion. (6) And although goods are purchased in the usual course of trade of a bankrupt *after* a secret act of bankruptcy, Lord Ellenborough held, that the very act of taking the goods from one, who had no right to dispose of them, was in itself a conversion. (7)

As to admission of proceeds in an account stated.

In an action of *trover* by the assignees, proof of an *account stated* between the bankrupt and the defendant — from which it appears, that certain proceeds constituting part of the account had come into the hands of the defendant subsequently to the bankruptcy — is sufficient to throw upon the defendant the *onus* of proving his right to

(1) *Wills v. Wells*, 8 Taunt. 254.  
2 Moore, 247.

(2) *Boyer v. Dodsworth*, 6 T. R. 681.

(3) *Nixon v. Jenkins*, 2 H. B. 135.

(4) *Soame v. Watts*, 1 Carr. N. P. Rep. 400.

(5) But see section 81.

(6) Bull. N. P. 41.

(7) *Hurst v. Gurney*, 2 Star. Rep. 307.

retain such proceeds, although a large debt upon the balance may be due to the defendant. (1) *Trover.*

Where the assignees were sued with the bankrupts in *trover* for goods, and the plaintiff proved that the bankrupts *before* their bankruptcy received, and afterwards disposed of the goods by way of pledge, having no authority so to do — and that the assignees *after* the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand, — it was held, that this evidence did not amount to a *joint* act of conversion against *all* the defendants — the acts of the bankrupts, and those of the assignees being not connected together, but wholly distinct; and that as there was only one count in the declaration, the evidence did not, therefore, warrant a general verdict of guilty against all the defendants. (2) *As to joint act of conversion.*

If a bankrupt shortly before his bankruptcy purchase goods on credit, and fraudulently resell them for ready money considerably under their invoice price, — in this case, neither an action for goods sold and delivered (3), nor for money had and received (4), can be maintained by the assignees against the purchaser, to recover the difference between the sums paid to the bankrupt and the value of the goods; for, by bringing an action for goods sold and delivered, the assignees would affirm the contract; and a party selling goods at a price below their value, cannot recover the difference in an action for money had and received. The assignees might, perhaps, on account of the gross *fraud* practised in such a case, treat the supposed sale of the goods to the defendant as a nullity, and an *trover* would be the proper remedy. (5) *When assumpsit will not lie.*

But assignees, in suing a defendant on a contract of sale, are not to be taken absolutely to affirm that the *Though assumpsit affirms the*

1) *Carter v. Barclay*, 3 Star. p. 43.

2) *Nicoll v. Glennie*, 1 M. & S.

(3) *Burra v. Clarke*, 4 Camp. 355.

(4) *Hogg v. Mitchell*, 1 Star. 241.

(5) 4 Camp. 355.

**Assumpsit.**  
 contract,  
 it does not  
 admit no  
*fraud* in  
 the other  
 party.

transaction is *fair throughout* — but merely that nothing *on the part of the bankrupt* was fraudulent; they do not therefore admit, that there was no fraud in the parties against whom they are undertaking to enforce it. Thus, where third persons holding the acceptance of a bankrupt, who was known then to be in bad circumstances, agreed with the defendants, in order to get value for this bill, (which had been before refused to be taken by the bankrupt in payment for goods from such third persons) that it should be indorsed to defendants, who should buy goods of the bankrupt in *their own names*, but for the account of such third persons, and then set-off the bill in payment for the goods, — it was held, that though this was a fraudulent contrivance between the defendants and the original holders of the bill to get payment of the whole debt of the latter out of an insolvent estate, yet that the assignees might maintain an action for goods sold and delivered against the defendants; and that the defendants could not set off the bill. (1)

Assignees  
 may bring  
 assumpsit  
 on a con-  
 tract of  
 bankrupt  
 made *after*  
 the bank-  
 ruptcy.

The assignees also, as has been before stated (2), may adopt any contract of the bankrupt, though made by him *after* an act of bankruptcy, and may therefore sue the contracting party in *assumpsit*. Thus, where the bankrupt after the act of bankruptcy, contracted with a factor (to whom he had delivered goods for sale, and who had accepted a bill upon the strength of the goods) to return the bill to the factor, if he would return the goods to the bankrupt, and the bankrupt did accordingly return the bill, — the assignees were considered entitled to recover against the factor for the non-delivery of the goods. (3)

When no  
 money ac-  
 tually re-  
 ceived, as-  
 sumpsit  
 for money  
 had and

But in a case, where East India stock was transferred by a bankrupt *after* his bankruptcy, it was held, that the assignees could not, in order to recover the value of it, maintain an action for money had and received against the person to whom it was transferred; for such an action, it

(1) *Fair v. M'Iver*, 16 East, 130.

(2) *Ante*, 730.

(3) *Butler v. Carter*, 2 Star. 455.

was held, would not lie, where *no money* has actually been received. (1) The proper form of action, in this instance, seems to have been a special action on the case.

Where counts for *money lent* and for money paid by the plaintiff as *assignee*, were joined with counts for money had and received to plaintiff's use, and upon an account stated with him as assignee, it was held that these counts might well be joined, upon the special ground of the 5 G. 2. c. 30. s. 32. (2), which provided that the creditors might direct, where the money arising out of the bankrupt's estate might be paid in and remain — under which section the Court was of opinion that it would be lawful for an assignee to lend; but that if no case could be put, where it would be lawful for him to do so, the declaration would have been bad. (3)

In an action of assumpsit, unless there has been an express promise to the assignees, the right way of declaring is, to lay the promise to have been made to the bankrupt. (4) But if there has been any promise to the assignees, or any cause of action accruing since the bankruptcy, care must be taken to insert some count in the declaration adapted to such demand. (5)

Where in an action by assignees against a defendant for goods sold by the bankrupt, the declaration contained counts on promises made to the bankrupt before his bankruptcy, and also on an account stated with the plaintiffs as assignees — to which the defendant pleaded a former action brought by the bankrupt upon the same promises before his bankruptcy, and still pending, — it was held, on demurrer, that the plea was bad — first, because the former action could not have been brought upon the account stated with the plaintiffs as assignees — secondly, because the assignees

*Assumpsit.*

received  
will not  
lie.

As to  
counts for  
*money lent*  
by assign-  
ees.

Mode of  
declaring.

Plea of  
action  
pending by  
bankrupt,  
bad.

(1) *Nightingale v. Devisme*, 5 Burr. 2589.; but see *Reed v. James*, 1 Star. 134.

(2) And see section 102. of the new act.

(3) *Richardson v. Griffin*, 5 M. & S. 294.

(4) *Rig v. Wilmer*, 2 Str. 697. Anon. 6 Mod. 131. *Fashien v. Dormet*, 7 Vin. 139.

(5) Chitty on Pleading, vol. i.

could not continue the former suit, even if they wished it. (1) In *assumpsit* by the provisional assignee, where the defendant pleaded the general issue, — it was held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the general assignees, between the time of the issuing of the writ and the delivery of the declaration, was no ground of nonsuit upon a plea of *non assumpsit*. Whether it would have been an answer to the action, if specially pleaded, was left undecided. (2)

In *covenant* for rent, assignees not obliged to set forth their title.

In an action of *covenant* for rent accrued since the bankruptcy, brought by the assignees against the bankrupt's lessee, the defendant is estopped from pleading that the bankrupt *nil habuit in tenementis*, nor can he force the assignees to set forth in the declaration their title to the land. (3)

Debt against an executor. Plea of retainer.

An action of *debt* on a *simple contract* cannot be maintained by assignees against an *executor*. (4) And in an action of *debt* by the assignees, on a bond given to the bankrupt to secure an annuity, for payments accruing after the bankruptcy, where it appeared that, before any payment of the annuity became due, the grantor lent the bankrupt a sum of money, on which it was agreed, that the grantor should retain the payments of the annuity as they became due until that sum was discharged; — it was held, that this agreement and retainer might be properly pleaded, being considered equivalent to a plea of *solvit ad diem*. (5) In *debt* on a specialty, assignees need not make *profert* of the deed; because they are in by act of law, and may not have the means of obtaining the deed to set it forth or produce it. (6)

Profert.

Ejectment had on a demise

Where an action of *ejectment* was brought by assignees to recover the bankrupt's freehold property, and the demise

(1) *Biggs v. Cox*, 4 B. & C. 920.

(2) *Page v. Bauer*, 4 B. & A. 209.  
345. S. C. nom. *Page v. Vaughan*,  
2 Star. Evid. 167. note (r).

(3) *Parker v. Manning*, 7 T. R. 507.

(4) *Morgan v. Green*, Cro. Car.

(5) *Sturdy v. Arnaud*, 3 T. R. 599.

(6) *Gray v. Fielder*, Cro. Car. 209.



was laid *before the bargain and sale* of the lands in question to the assignees, though after the date of the commission, it was held that they were not entitled to recover; for the doctrine of relation back to the act of bankruptcy is applicable only to the assignment of the *personal* property of the bankrupt, and does not extend to the conveyance of his *freehold* property, which remains in the bankrupt, though not beneficially, until taken out of him by the bargain and sale. (1)

*before the bargain and sale.*

In a case where *trespass* was brought *against* assignees for seizing goods, which they contended were assigned fraudulently by the bankrupt to the plaintiff;—it was held by Gibbs C. J., that the fraudulent conveyance was not of itself a sufficient defence, without proving an act of bankruptcy committed by the bankrupt. (2)

*In trespass against assignees, fraudulent conveyance not alone a sufficient defence.*

Where an action was brought against assignees to recover the proceeds of a bill which had been specifically appropriated, it was held necessary to prove, that the produce of the bill came into the hands of the assignees, with a *knowledge on their part* of the purposes for which the bill was destined. (3)

*Proceeds of bill specifically appropriated.*

No action can be maintained by the assignees for a mere *personal* tort to the bankrupt, as for *assault*, or *slander*. But a late learned writer (4) seems to think, that in the case of a tort to the *property* of the bankrupt, which may *have deteriorated its value*, (such, for instance, as running down a ship, or cutting timber) whereby the assignees are deprived of the benefit which they would otherwise have enjoyed, the assignees might then sustain the action. It has been doubted, however, whether the assignees can sue for a *tort* committed against the estate of the *provisional assignee*; but in one case they were permitted, even after

*Assignees cannot sue for a personal tort to the bankrupt.*

(1) *Doe v. Mitchell*, 2 M. & S. 5. an act of bankruptcy. See ante, page 63. et. seq.

(2) *Young v. Wright*, 2 Marsh, 5. But quære, whether the conveyance being proved to be fraudulent, ought not of itself in this case to have been considered as

(3) *Kieran v. Johnson*, 1 Star. 109. Quære tamen; and see *Ex parte Sayers*, 5 Ves. 169.

(4) Evans's Statutes, 329. 2d edition.

two terms had elapsed, to amend the declaration, which stated the wrong to be done to the provisional assignee. (1)

As to immunity of a garnishee.

Where a debtor to the bankrupt has paid money to a third person under due process of local law, he is not liable to an action by the assignees; therefore, though a creditor of the bankrupt attaching the effects abroad is, as we have seen (2), liable to refund to the assignees, yet the garnishee himself, of whom the debt has been so recovered, is not compellable to pay it over again. (3)

Where debt under 40s.

Where debts are under 40s., the assignees must, like other persons, sue for them (4) in the court of requests.

Assignees barred by statute of limitations.

If the statute of limitations is pleadable by a debtor in respect of his own debt against the bankrupt, the assignees may be barred by it likewise; and the time is to be computed from the date of the original cause of action, and not from the date of the commissioners' assignment (5) But where a verdict is found for the assignees as plaintiffs in an action, it is no ground for setting aside the verdict, that it did not appear that the petitioning creditor's debt was contracted within six years before the suing out of the commission. (6) Where the defendant, in an action by assignees, pleads that the bankrupt *released* the debt before he became bankrupt, and issue is joined on this plea which is found for the assignees — and it appeared also at the trial, that the release was executed more than two months before the issuing of the commission, though after the defendant knew of the act of bankruptcy; — it was held, under these circumstances, that the assignees were not obliged to allege in their replication to the defendant's plea, that the defendant *knew* that the bankrupt had committed an act of bankruptcy before the execution of the release — but that it was sufficient to prove that fact (7) at the trial.

Need not allege in pleading, that the defendant had notice of the act of bankruptcy.

(1) *Freen v. Cooper*, 6 Taunt. 558.

(2) Ante, 400.

(3) *Le Chevalier v. Lynch*, Doug. 170.; and see *Mawdesley v. Parke*, cit. 1 H. B. 680.

(4) *Keay v. Rigg*, 1 Bos. & P. 11.

(5) *Gray v. Mendez*, 1 Str. 555. *South Sea Company v. Wymondell*, 3 P. Wms. 143. *Ashbrooke v. Manby*, Comb. 70.

(6) *Mavor v. Pyne*, 3 Bing. 285.

(7) Ibid.

When an assignee dies, or is removed, we have seen (1), that no action then pending is thereby abated, but that it may be prosecuted in the name of the surviving or new assignees. But, if an order be made by the Lord Chancellor to remove one of several assignees, and such order is not followed up by an actual re-assignment, or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners, — the removed assignee ought, in that case, to join in the action; though, in an action of *trover*, the non-joinder can only be pleaded in abatement; and the other assignees who sue may recover the proportional parts or shares of the property sought to be recovered. (2) A new assignee may sue in debt upon a judgment recovered by a former assignee removed by the Lord Chancellor, and may declare in a general form as having been *duly* constituted and appointed assignee, &c. (3) And it seems, that when one of several assignees is removed, and assigns his interest to the other assignees, they may maintain an action for money had and received against him, for money which came to his hands whilst he continued assignee. (4)

Action not abated by death of assignee. When a removed assignee must join in the action.

New assignee may sue on a judgment recovered by a former assignee. Liability of a removed assignee.

When an assignee is not a creditor, and the bankrupt brings an action against him to dispute the bankruptcy, if the assignee is so much identified in interest with the bankrupt, that the action would not be properly tried if he defended it, the Lord Chancellor will order, that the petitioning creditor shall have the conduct of defending the action. (5)

When an assignee not permitted to defend an action by bankrupt.

If the bankrupt, prior to his bankruptcy, has duly assigned his interest in a *chose in action* to a third person, the action must not be in the name of the assignees, but in the name of the bankrupt (6); for property, in which the

Assignees cannot sue for a *chose in action* duly assigned.

(1) See ante, 728.

(2) *Bloxam v. Hubbard*, 5 East, 17.

(3) *De Cosson v. Vaughan*, East, 61.

(4) *Smith v. Jameson*, Peake, 213. S. C. 5 T.R. 601. *Wray v. Barwis*, Peake, 69.

(5) *Ex parte Stewart*, 2 Rose, 6.

(6) *Carpenter v. Marnell*, 5 Bos. & P. 40.

**Assumpsit.**

bankrupt has only a *trust estate*, does not pass in any way to the assignees under the commission.

Provision  
for pay-  
ment of  
money  
into court.

By *section 98.* of the new statute, if the assignees commence any action or suit for any money due to the bankrupt before the time allowed for him to dispute the commission shall have elapsed, the defendant may, after notice to the assignees, pay the same or any part thereof into Court; and all proceedings with respect to the money so paid shall thereupon be stayed, and after the time given to the bankrupt to dispute the commission shall have elapsed, the assignees may have the same paid to them out of Court.

Assignees are not restrained, any more than other persons, from bringing a fresh action after a nonsuit. (1)

Actions by  
assignees  
of one of  
several  
partners.

When one of several *partners* becomes bankrupt, it is provided by *section 89.* of the new statute, that the assignees may, upon obtaining the order of the Lord Chancellor, prosecute any action in the joint names of such assignees, and of the remaining partner or partners. (2) In such a case, indeed, if any action *ex contractu* is brought in the names of *all* the partners, the bankruptcy may be pleaded in bar. (3) And even where money is paid by solvent partners *after the bankruptcy of the others*, on account of the dealings of the general partnership, they cannot sue for it without joining the assignees of the bankrupt partners as plaintiffs. (4) Where goods are *bonâ fide* delivered for a valuable consideration to a third person by the solvent partner, after the act of bankruptcy of the other partner, the assignees of the bankrupt partner cannot maintain *trover* against the consignee of the goods; for the assignees are in such case tenants in common with the consignee, by relation from the time of committing

When  
goods de-  
livered by  
solvent  
partner  
*bonâ fide.*

(1) *Ex parte Hilton*, 1 Jac. & W. 467.

(2) And see *Thomason v. Frere*, 10 East, 61.

(3) *Eckhardt v. Wilson*, 3 T.R. 140.

(4) *Graham v. Robertson*, 3 T.R. 282.

the act of bankruptcy, and one tenant in common cannot maintain (1) trover against another. And still less could the assignees maintain such action, when the consignee of the goods happened, also, to be the executor (2) of the solvent partner.

The assignees of two partners under separate commissions cannot recover in the same action a joint debt due from the defendant, and also separate debts due from him to each partner. (3) But, where the plaintiffs sued as assignees of A. and B., and also as assignees of C. for a joint debt due to all three partners (for which they could formerly, in strictness of law, only sue as assignees, either under three separate commissions, or under one joint commission against the three partners (4)), the declaration was held good, on motion in arrest of judgment after verdict; for it did not appear by the record, under how many commissions the assignees actually claimed. (5)

In an action by assignees under a joint commission against A. and B., the declaration was for money had and received by the defendant to the use of A. and B. before they became bankrupts, and for money had and received to the use of the plaintiffs as assignees of A. and B. after their bankruptcy: — the evidence was, that A. committed an act of bankruptcy a few days before B. committed one, and that a clerk of the bankrupts between these acts of bankruptcy paid to defendant 558*l.*, and after both acts of bankruptcy 5*l.* more; — it was held, that under this declaration the assignees were only entitled to recover the 5*l.* paid after the bankruptcy of both partners, and not the 558*l.* paid before the bankruptcy of B.; though it seems, that if they had declared for money had and received to

Partners

Joint debt and separate debt not recoverable in the same action.

Irregularity cured by verdict.

Mode of declaring by joint assignees, where debt accrued between the acts of bankruptcy of the different partners.

(1) *Smith v. Oriel*, 1 East, 367. *For v. Hanbury*, 2 Cowp. 445.; and see *Ramsbottom v. Lewis*, 1 Camp. 279.

(2) *Smith v. Stokes*, 1 East, 363.

(3) *Hancock v. Haywood*, 3 T. R. 433.

(4) A commission, however, may now by section 16. of the new act, be issued against one or more members of a firm.

(5) *Streatfield v. Halliday*, 3 T. R. 779.

Against the sheriff. their use as assignees of A., they might then have recovered one moiety of the 558*l.* paid between the two acts of bankruptcy. (1)

When assignees may maintain *trover* against the sheriff.

Cannot have *trespass* before assignment.

May have *trover* against the plaintiff suing out the execution, or the vendee of the goods.

The property of a bankrupt being vested in his assignees by relation from the act of bankruptcy, — if a sheriff, therefore, takes the bankrupt's goods in execution *after* an act of bankruptcy, and afterwards sells them, the assignees may maintain *trover* against him. But they cannot have *trespass* — not even where the sheriff levies, or pays over the money, after an act of bankruptcy, of which he has notice (2); for trespass cannot be maintained, unless the plaintiff had *at the time* when the trespass is alleged to be committed, either an *actual* or a *constructive* possession of the thing which is the object of the trespass; and the assignees (though they have by the assignment a right given them which relates back to the act of bankruptcy, so as to avoid all mesne incumbrances) have not such a possession as to bring *trespass* for an act done before such right was given them; for no defendant can be made a trespasser by relation. (3) The assignees, however, may also have *trover*, or *assumpsit*, either against the vendee of the sheriff — or the plaintiff in the original action, if he has received the money of the sheriff. (4) Thus, where a bankrupt after the act of bankruptcy was arrested upon a *ca. sa.*, and placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the defendant, — it was held, that the assignees might recover the amount of money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer, and although the money paid to the defendant was not the identical

(1) *Smith v. Goddard*, 3 B. & P. 465. *mere v. Thoroughgood*, Comb. 123. 1 Show. 12. 1 Mont. 474.

(2) *Cooper v. Chitty*, 1 Burr. 20. *Smith v. Milles*, 1 T. R. 475. *Lech-*

(3) Per Ashurst J. 1 T. R. 480.

(4) *Kitchin v. Campbell*, 3 Wilk. 304. *Cole v. Davies*, 1 Ld. R. 724.

money raised by the pledge.(1) The assignees may likewise bring trover against the plaintiff in the action, if he intermeddle with the sheriff in any way—such as by being in company with the officer at the time of the execution, or by giving a bond to the sheriff(2); and, in trover against the plaintiff, the sheriff need not be joined in the action.

*Against the sheriff.*

Where after an act of bankruptcy the sheriff seized and removed the goods to a broker's, and the assignees afterwards served a notice upon him not to sell, in consequence of which the goods were never sold, but remained at the broker's,—it was held, that the removal of the goods was a sufficient conversion, and that the notice did not amount to any admission that they had not been converted.(3) So, in a case where the sheriff legally took goods under one execution, the proprietor of which afterwards became bankrupt—and then sold enough to satisfy both that execution and also *another execution*, which being delivered to him *after the act of bankruptcy* was void,—it was held, that the sale of goods of greater value than was sufficient to satisfy the *first execution* was a tortious conversion, the sheriff having no right to sell more than was necessary; and that *trover* was the proper form of action by the bankrupt's assignees, to recover the value of such of the goods, as were sold after the sheriff had raised money enough to satisfy the *first execution*. (4)

What amounts to a conversion by the sheriff.

The sheriff, however, will be safe from any claim by the assignees, if he *levies before* the act of bankruptcy, and afterwards *pays* the money over to the plaintiff *without any notice* of the act of bankruptcy; for, as he has a right to levy, he is bound to pay over the money to the person at whose *suit* the execution is issued, the whole being considered in law as one act; and it would be inconsistent to say that

When the sheriff will be safe from the claims of the assignees.

(1) *Allanson v. Atkinson*, 1 M. & S. 583.

(3) *Wyatt v. Blades*, 3 Camp. 595.

(2) *Rush v. Baker*, 2 Str. 996.

(4) *Stead v. Gascoigne*, 8 Taunt.

Bull. N. P. 41. *Menham v. Ed-*

527.

*sonson*, 1 Bos. & P. 369.

*Against the sheriff.*

When the Court will assist him.

Fraction of a day.

he had *levied legally*, but had *paid it illegally*. (1) And when the money has been paid over by the sheriff *before the commission*, the Court will not assist the assignees upon motion, in giving effect to the relation of the bankruptcy, — so as to make the sheriff pay over to *them* money levied *after* an act of bankruptcy (by lying in prison), but *before* the time to *complete* the act of bankruptcy expired. (2) The Court, too, will in some cases even notice the fraction of a day in favor of the sheriff; as in a case where, after the sheriff took possession under a *fi. fa.*, the defendant at a *later hour* of the same day surrendered in discharge of his bail, and afterwards lay in prison the period of time sufficient to constitute an act of bankruptcy, — it was held, that the sheriff having entered in fact before the time from which the bankruptcy was to be computed, the assignees were not entitled to recover. (3) And, in all cases, if the sheriff acts fairly, and is under difficulties how to conduct himself, the Court will endeavour to help him, as far as it is possible. Thus, if he is reasonably doubtful about the property, the Court will give him time to make his return, or compel the parties to file a bill of interpleader, or oblige the assignees to prove the act of bankruptcy and the assignment. (4) And in one case, where the sheriff was made a defendant, and neither the execution creditor, nor the assignees, would indemnify him, the Court directed the declaration to be amended, by inserting the name of the execution creditor, instead of that of the sheriff, as the defendant; directing

(1) *Vernon v. Hankey*, 2 T. R. 121. per Buller J.; and see *Stead v. Gascoigne*, 8 Taunt. 527. It has been said, that the court of Exchequer, in a case which is not reported, have held the sheriff liable in trover, though he seized, sold, and paid over the money before the commission issued, and before any notice of it; saying, that this necessarily followed from the

case of *Cooper v. Chitty*, for that it was an unlawful interference with another's goods. *Potter v. Starke*, cited in argument, 4 M. & S. 260. The seizure, however, in this case, must be understood to have been *after* the act of bankruptcy.

(2) *Clarke v. Ryall*, Bl. 642.

(3) *Thomas v. Desanges*, 2 B. & A. 586.

(4) 1 Burr. 37.



also that the defendant should plead *instante*, and admit upon the trial the taking of the goods; and that the sheriff should be discharged from all responsibility, upon selling the goods, and bringing the money into court, having apprized the parties of the time and place of sale; his right of poundage of course depending on the question whether the execution was warranted. (1) The proper course for the sheriff to pursue (where both parties refuse to indemnify him) appears to be, to apply to the Court for a rule to enlarge his return of the *fi. fa.* from time to time—or, if an action has been commenced against him, then for a rule to stay proceedings—until he is indemnified, or upon such other terms as the Court may think the equity of the case requires. This rule, however, can only be a rule nisi in the first instance. (2) The Court will likewise, in favor of the sheriff, take his return of a writ as made at the time when it is made in fact, and not as at the return day specified in the writ. Thus, *nulla bona* will be a good return by the sheriff to a *fi. fa.* sued out against the bankrupt's goods, though it is returnable within twenty-one days from his lying in prison—if it be *not actually returned* until he has laid in prison the whole of the twenty-one days, and thereby become bankrupt. (3)

*Against the sheriff.*

Where parties refuse to indemnify sheriff.

When the Court will not interfere.

But if the sheriff *voluntarily* take a part, and elect (either before or after the goods are sold) to which party he will pay the money—and receive also an express, or an implied, indemnity (for either is sufficient) from the party to whom he so elects to pay it over,—he must then resort to that party for security in case he is wrong; and the Court will, in such case, not interfere in his behalf. (4) And where the sheriff had kept the proceeds of the goods in his possession for a length of time upon frivolous pretences, the Court would not assist him by taking notice in a col-

(1) *M<sup>r</sup> George v. Birch*, 4 Taunt. 585.

(3) *Coppendale v. Bridgen*, 2 Burr. 814.

(2) *King v. Bridges*, 7 Taunt. 494. 1 Moore, 43. *Ledbury v. Smith*, 1 Chit. Rep. 294.

(4) *Aldridge v. Ireland*, cited 1 Taunt. 273.

*Against the sheriff.*

As to right to poundage.

lateral way of a commission of bankrupt which afterwards issued, so as to stay proceedings against him in an action for a false return, pending which he paid the money to the assignees. (1)

It is stated in one case that where the sheriff *levied after the bankruptcy*, and the assignees had commenced an action against him, the Court of King's Bench made the rule for staying proceedings and indemnifying him, upon the terms of his paying over the money levied, and the costs of the action up to the time of the application, *he being paid his poundage and the costs of the execution.* (2) But this last condition seems rather an extraordinary one to impose on the assignees, if the fact was that the sheriff (as is stated) *levied after the bankruptcy*; for, if that was the case, the execution was altogether illegal, and he could then have no right to poundage. (3)

When not compellable to return writ without indemnity.

Where a plaintiff withdrew his execution against the bankrupt's goods, under a consent from him that there should be a fresh levy, if the debt were not paid within a given time—and the goods were afterwards seized under an execution at the suit of another plaintiff—upon which the first plaintiff placed his warrant in the hands of the second plaintiff's officer, who (the defendant having then become bankrupt) left in the possession of the assignees all the effects remaining, after satisfying the second plaintiff's execution to the exclusion of the first;—the Court held, that though the effects were sufficient to satisfy both executions, the sheriff could not be compelled to return the first plaintiff's writ, until he should have been indemnified, and the prothonotary should have decided which of the parties should indemnify him. (4)

(1) *Timbrell v. Mills*, 1 Bl. 205.

(2) *Probinia v. Roberts*, *ibid.* ante, 749.

577.

(3) See *M'George v. Birch*,

(4) *Burr v. Freethy*, 1 Bing. 71.

## SECTION III.

*Effect of the Bankruptcy on Suits and Actions previously commenced by, or brought against, the Bankrupt.*

If the plaintiff or defendant in a suit in equity becomes bankrupt, it seems that the suit (1) does not thereby absolutely abate, but the assignees may proceed in it in the name of the bankrupt. This point, however, has been differently ruled by Lord Thurlow, who was of opinion, that the bankruptcy of a sole plaintiff so far put an end to the suit, that the assignees could not add to it by a mere supplemental bill, but that they must file another *original* bill in the nature of a supplemental bill. (2) But subsequent cases appear to have established the former decision of Lord Hardwicke, namely, that the suit does not abate by the bankruptcy of the party (3); in one of which, indeed, it is holden, that where a *defendant* becomes bankrupt, the plaintiff cannot even move to dismiss his own bill without paying costs. (4) This, however, seems a great hardship upon the plaintiff; as the *defendant* may move to dismiss the bill *with costs* for want of prosecution, and thus compel the plaintiff to go on with the suit, although he may really wish to abandon it and come in under the commission. (5)

*Suits in equity not abated by bankruptcy of the plaintiff.*

*But assignees must file a supplemental bill.*

*Difference between the judgment against a plaintiff at law and in equity.*

(1) Anon. 1 Atk. 263.

(2) *Sellas v. Dawson*, 2 Anstr.

458. in note, and cit. C. B. L. 545.

*Lingard v. Webb*, 3 Bro. 435.; and

see *Harrison v. Ridley*, 2 Com.

Rep. 589. Mitf. 62.

(3) *Davidson v. Butler*, 1 C. B.

545. 2 Anst. 460. n. *Tait v.*

*Carrick, Bramhall v. Cross*, cit.

ibid. *Williams v. Kinder*, 4 Ves.

587.

(4) *Rutherford v. Miller*, 2 Anstr.

458.

(5) *Monteith v. Taylor*, 9 Ves.

615.

become bankrupt, are only permitted to take advantage of the proceedings by making themselves parties to the suit, and filing a supplemental bill; for a court of equity requires a substantive plaintiff, who may abide such decree as may be made. (1) Thus, though the suit is not (strictly speaking) abated, it becomes by the bankruptcy of the plaintiff as defective as if it were. Upon a motion, however, to dismiss the bill for want of prosecution, the Court has in some instances, given the assignees a month to adopt the suit by filing a supplemental bill, previous to a final application that the bill should be dismissed. (2)

Present practice when the defendant moves to dismiss the bill.

The practice, as collected from the modern decisions, seems to be, to order a supplemental bill to be filed by the assignees within a fortnight, or that the bill be dismissed without costs (3); and the proper mode of making the application is by special motion, of which notice should be given to the assignees. (4) The practice in the Exchequer is the same, in this respect, as that of the Court of Chancery. (5) But in one case, where money was ordered by a decree to be paid to the plaintiff, who afterwards became a bankrupt, and he and his assignees applied by petition, that the money might be paid to the assignees — the sum being too small to bear the expense of a supplemental bill, — Lord Thurlow ordered it to be paid to the assignees, without such a bill being filed. (6)

When money ordered to be paid to assignees, without a supplemental bill.

As to bills previously filed by a bankrupt for an injunction.

An order *nisi* obtained by a defendant for dissolving an injunction will be made absolute, notwithstanding the plaintiff becomes a bankrupt, unless the plaintiff shows cause. (7) And where a bill was filed by the plaintiff in the Exchequer for an injunction, and he afterwards became a bankrupt, the bill was upon motion ordered to be dis-

(1) 4 Ves. 588.

(2) *Mumford v. Randall*, 1 Rose, 196.; and see *Montcith v. Taylor*, 9 Ves. 616. *Sellers v. Dawson*, Dick. 738. *Ex parte Barry*, 1 Dick. 81. *Hall v. Chapman*, *ibid.* 348. 18 Ves. 424. 4 Madd. 171.

(3) *French v. Barton*, 18 Ves.

423. *Wheeler v. Mafin*, 4 Madd.

171. *Porter v. Car*, Buck. 469. 5 Madd. 80.

(4) Buck. 469.

(5) *Fowler's Exchequer*, vol. i. 286.

(6) *Setcole v. Healy*, 2 Bro. 312

(7) 1 Atk. 263.

missed with costs for want of prosecution, the Lord Chief Baron saying, that it was the course of practice in that Court to charge the bankrupt with costs according to the circumstances of the case. (1)

After the usual decree for an account against executors, one of the defendants became bankrupt. The assignees by petition prayed, that they might be at liberty to go before the Master upon taking the accounts, and be admitted on behalf of the bankrupt's creditors to support his discharge. The registrar declined drawing up the order, objecting that the suit being *abated* by the bankruptcy, the plaintiffs could not proceed in the accounts, until they had filed a supplemental bill in the nature of a bill of revivor, — and the Lord Chancellor upon this refused to make the order. (2) Where assignees of a defendant have been brought before the Court by supplemental bill, they will be liable to the costs of the whole cause if they improperly resist the plaintiff's demand: but in a case where the plaintiff had made no application to them before filing the supplemental bill, the Court did not give costs against them. (3)

As to filing supplemental bill.

And costs thereon.

In *actions at Law*, also, though the bankruptcy of the plaintiff after action brought is strictly no absolute *abatement* of the suit (4), and the action has been occasionally permitted to be continued by the assignees in the name of the bankrupt, — yet this must now be taken, subject to the right of the defendant to *plead* the bankruptcy *in bar*; or where a defendant has a day in court to plead, and the means likewise of pleading the plaintiff's bankruptcy, the Court cannot refuse to give effect to a legal defence of this nature. (5) And such a plea may be pleaded even

In *actions*, defendant may plead the bankruptcy *in bar*.

1) *Davison v. Butler*, 1 C. B. 546.

2) *Russell v. Sharp*, 1 Ves. & 500. The reason assigned by the registrar in this case is *bad*, though the rule of practice was correct; for it has been sufficiently shown that the bankruptcy of a party is in equity no *abatement* of suit.

(3) *Whitcomb v. Minchin*, 5 Mad. 91.

(4) *Bibbins v. Mantell*, 2 Wils. 358. *Hewitt v. Mantell*, *ibid.* 372. *Kretchman v. Beyer*, 1 T. R. 463. *Waugh v. Austin*, 3 T. R. 437.

(5) *Kinnear v. Tarrant*, 15 East, 622. *Barnes v. Maton*, *cit. ibid.* 631. *Biggs v. Cox*, 4 B. & C. 920.

Where the proceeding before the bankruptcy was by *sci. fa.*

Where the parties were at issue.

Assignees should bring a fresh action.

After judgment assignees may pro-

after the last continuance. Where the defendant, however, has no day in Court to plead the bankruptcy in bar, there it will not operate in abatement of the suit; as where the plaintiff obtained interlocutory judgment before his bankruptcy, the action was held properly to proceed in his name during the execution of the writ of inquiry, and until final judgment—on the ground, that after the award of the writ of inquiry, the defendant could not afterwards plead any thing to the action. (1) In an early case in the books on this subject, where the plaintiff became bankrupt after he had recovered by *scire facias*, the Court ordered the special matter to be entered, to entitle his assignees to the benefit of the judgment on the *sci. fa.*, without bringing a new *sci. fa.* (2) And in one case, where the parties were at issue, and notice of trial had been given, and the plaintiff before trial became a bankrupt, the Court upon motion permitted the trial to go on in the name of the bankrupt, upon the assignees undertaking to pay the costs of suit, in case a verdict should be given for the defendant. (3)

But the safest course appears to be—when the action is commenced by the bankrupt previous to his bankruptcy, and is in such a stage of proceeding as will enable the defendant to plead the bankruptcy in bar—that the assignees should not continue the proceedings in the name of the bankrupt, but bring a fresh action (4) in their own names; for, if the defendant pleads the bankruptcy, the plea will be good, notwithstanding the plaintiff replies, that the proceedings are continued by the assignees in the name of the plaintiff for the use and benefit of the plaintiff's creditors, and not for the use of the plaintiff. (5) After judgment, however, whether interlocutory (6) or final, the assignees may make *themselves* parties to the record, by suing out a

(1) *Bibbins v. Mantell*. *Hewitt v. same*, *supra*; but see *Monk v. Morris*, *Ventr.* 193.

(2) *Plummer v. Lee*, 5 *Mod.* 88.

(3) *Priddle v. Thomas*, cited, 2 *Wils.* 373.

(4) *Barnes v. Maton*, *cit.* 15 *East*, 631.

(5) *Kinnear v. Tarrant*, 15 *East*, 624.

(6) Per *Wilmot C. J.* 4 *Wils.* 375. *Kretzman v. Beyer*, 1 *T. R.* 463.

*scire facias ad inquirendum*, or *quare executionem non*, as the case may be; but they cannot do this in any intermediate stage of the proceedings. (1) Nor where a plaintiff even recovers judgment — yet if the defendant brings a writ of error which is duly issued, allowed, and served before the plaintiff's bankruptcy — can the assignees sue out a *scire facias* on the judgment; for it would be bad, either as a *scire facias quare executionem non*, or as a *sci. fa. to compel an assignment of errors*; as, in the first case, it would appear (from the recital in the *sci. fa.*) that a writ of error was depending, — and in the last, (independently of such recital,) there would have been a proceeding since the judgment. (2) But the assignees may sue out a *sci. fa.* on the recognizance against the bail; in which they should state, that an assignment was duly made to them of the bankrupt's estate and effects; though this omission can only be taken advantage of on special demurrer. (3) And where a plaintiff after judgment became a bankrupt, and afterwards sued out execution, and the money was levied by the sheriff and brought into Court, — the Court in this case refused, upon motion of the assignees, to order the money to be paid to them — but consented to detain it, that the assignees might take out a *scire facias* against the defendant to try the bankruptcy. (4) In another case, however, (as we have already seen) where the plaintiff had judgment on *scire facias*, the Court, upon motion, dispensed with a *resh sci. fa.* (5)

ceed by  
*sci. fa.*;

except  
where de-  
fendant  
brings a  
writ of  
error.

Where  
bankrupt  
levies the  
money  
under an  
execution  
after the  
bank-  
ruptcy.

Where a defendant became bankrupt after the issuing and execution of a *fi. fa.*, but before the sale of the goods taken under it, and there was a variance between the *fi. fa.* and the judgment, — the Court of King's Bench refused to allow the plaintiff to amend the *fi. fa.*, to make it conformable to the judgment. (6)

Where a  
defendant  
becomes  
bankrupt  
after the  
issuing a  
*fi. fa.*

1) Per Buller J. 1 T.R. 463.

2) Ibid.

3) *Fletcher v. Pogson*, 3 B.&C.

4) *Monk v. Morris*, Ventr. 193.  
Mod. 93.

(5) *Plumer v. Lea*, 5 Mod. 88;  
ante, 754.

(6) *Hunt v. Pasman*, 4 M. & S.  
329.; and see *Paris v. Wilkinson*,  
8 T.R. 153.

## CHAP. XIX.

OF THE EVIDENCE REQUIRED TO SUPPORT THE COMMISSION  
IN ACTIONS BY, OR AGAINST, ASSIGNEES.

- SECTION 1. *Where Notice is given to dispute the Commission.*
2. *Where a Party is not entitled to give such Notice.*
3. *Where no Notice is given.*
4. *Where no Proof of the Title of the Assignees is necessary.*
5. *As to the Admissibility of the Depositions and Proceedings under the Commission.*
6. *Of the Competency of the Bankrupt and his Wife as Witnesses.*
7. *Of the Competency of Creditors.*

Former  
practice as  
to proof  
upon the  
trial.

It was formerly necessary in all actions, where the assignees either as plaintiffs or defendants claimed property under the bankrupt, to prove strictly the three requisites to support the commission, viz. the trading, the act of bankruptcy, and the petitioning creditor's debt — as well as that the commission was regularly issued, and the assignment duly executed. Upon failure in proving any one of these matters, (the proof of which adds considerably to the costs of an action, and is often difficult to be established by strict rules of evidence) the assignees were nonsuited, and thus frequently prevented from recovering a just debt due to the bankrupt's estate. To provide in some measure for this evil, the 49 G. 3. c. 121. s. 10, 11. enacted, that the commission and proceedings should be evidence



of the petitioning creditor's debt, the trading, and act of bankruptcy, unless the other party gave notice of his intention to dispute them. But this, it seems, did not afford an effectual check to the vexatious defence so frequently set up to actions brought by assignees, notwithstanding the defendant was liable to pay the costs of forcing them to prove these several matters on the trial. The legislature has, therefore, now thought it expedient to enact, that in certain cases *no such proof* shall be required from the assignees; and in others, that the *depositions* of these matters before the commissioners shall be *conclusive evidence*; confining, in reality, the former general obligation of proof under the old system, to what may now be considered as excepted cases under the new.

Thus by *section 90.* of the new act, it is declared, that in any action by or against an assignee—or any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant—*no proof* shall be required at the trial of the *petitioning creditor's debt, the trading, or act of bankruptcy*, unless the other party in such action shall (if defendant, at or before pleading—and, if plaintiff, before the issue joined) give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters. And the party giving notice renders himself liable to the costs occasioned by it, if the disputed matter is proved by the other party upon the trial.

Enactment  
as to no-  
tice of in-  
tention to  
dispute the  
commis-  
sion in  
actions.

By *section 91.*, also, a similar provision is made as to suits in equity by or against the assignees, unless the party in the suit shall, within ten days after rejoinder, give notice in writing to the assignees of his intention to dispute; in which case, if the assignees shall prove the matter so disputed, the costs occasioned by the notice are, at the discretion of the Court, to be paid by the party giving it.

In suits in  
equity.

Difference  
between  
former and  
present  
enact-  
ments.

These two clauses, it will be perceived, are not (like those in the former statute (1)) confined to actions and suits by or against the *assignees*—but extend to those against *the commissioners, or any person acting under them*. There is, also, a material difference in the enactments; the former statute providing, that in case of no notice being given, “*the commission, and the proceedings of the commissioners under the same, shall be evidence to be received*” of the petitioning creditor’s debt, the trading, and act of bankruptcy—while the present statute declares, that “*no proof* shall be required at the trial” of those matters.

When de-  
positions  
made con-  
clusive  
evidence.

But when the assignees sue for a debt or demand for which the bankrupt might himself have sued, the present statute takes away from the defendant *all power* whatever of contesting those proceedings *after a certain period* allowed the bankrupt to dispute the validity of the commission; for by *section 92*. it is declared, that if the bankrupt shall not (if he be within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication—or (if out of the kingdom) then within twelve calendar months—give notice of his intent to dispute the commission, and proceed therein with due diligence, the depositions taken before the commissioners of the petitioning creditor’s debt, the trading, and act of bankruptcy, shall be *conclusive* evidence of the matters therein respectively contained in all actions or suits brought by the assignees for any debt or demand, for which the bankrupt might have sustained any action or suit.

In treating of these several enactments, it is proposed to consider, *first*, the evidence necessary to be adduced by the assignees where the defendant is entitled to give, and does give, due notice to dispute the petitioning creditor’s debt, or any of the other requisites to support the commission.

*Secondly*, Where the defendant is not entitled to give such notice.

(1) 49 G. 3. c. 121. s. 10, 11.

*Thirdly*, Where no notice has been given by him.

And *lastly*, to consider those cases, where the defendant is, by his own acts, wholly estopped from disputing the title of the assignees.

### SECTION I.

*Where the Defendant is entitled to give, and does give Notice to dispute the Commission.*

In all actions brought by the assignees for any debt or demand, for which the *bankrupt might himself have sued* if he had not been bankrupt, the defendant will only be entitled to give notice to dispute the commission within the same periods, as those allowed the bankrupt for the same purpose; in *other actions*, the defendant may use his own discretion in giving such notice; but he does so in each case at the hazard of costs. The defendant, however, can only give notice in actions where the *assignees*, or *commissioners*, or the *persons acting under their warrant*, are parties to the action. For in an action between *third persons*, if the validity of a commission of bankruptcy comes incidentally into question as a ground of defence, it must be regularly proved in the former manner required by law. (1) But the statute is not limited to cases where the assignees, or the commissioners, are *named as such* upon the record; but extends to actions, where the opposite party knows that they make out their title, or their justification (as the case may be), under the commission. (2) For before the former statute, though the assignees might not have stated themselves to be such in the declaration, yet if they had no title to recover, except as *assignees*, they were held bound to prove the petitioning creditor's debt, and the other requisites to support the

Difference  
as to pe-  
riod li-  
mited for  
giving  
notice.

No notice  
can be  
given in an  
action be-  
tween  
*third per-  
sons*.

(1) *Doe v. Liston*, 4 Taunt. 741. (2) *Simmonds v. Knight*, 3 Camp. 251. *Rowe v. Lant*, Gow. 24

Where notice given.

But may where assignees are co-defendants.

As to time of giving notice.

Where defendant omits to give notice, though intending to dispute.

commission. (1) The statute, also, is not confined to the case where the assignees are the *only defendants* on the record; for if there are other co-defendants who justify as their servants, the statute equally applies. (2)

As to the *time* of giving the notice, — the statute, it will be observed, in actions at law, requires the notice on the part of the *plaintiff* to be given before issue joined. A notice, therefore, delivered at the time of delivering the issue with notice of trial, is clearly sufficient. (3) The notice by the *defendant* being required to be given at or before pleading, — if he has therefore *omitted* to give notice *before pleading*, and means to dispute the several matters above specified, the regular course is to apply to the Court for leave to withdraw his plea, and plead *de novo* with such notice; the last plea will then be considered the plea of the party to all purposes, and on notice given at the time of pleading, it will be a sufficient compliance with the statute. (4) But, without an application to the Court, he cannot regularly withdraw a plea once pleaded, and deliver it again with a notice, though the time for pleading has not even expired. (5) So in a suit in equity, the defendant has (by analogy to the practice at law) been permitted to withdraw his rejoinder, and rejoin *de novo* for the purpose of giving notice; but the Court require from him an affidavit, that (according to his information and belief) it is essential to the justice of the case. (6) But, as this is merely an indulgence to the defendant, — in a similar case where the witness to the act of bankruptcy was dead, the permission was only granted, upon terms of admitting the deposition of the deceased witness. (7)

(1) Cowp. 570.

(2) *Gilman v. Cousins*, 2 Star. 182.

(3) *Richmond v. Heapy*, 4 Camp. 307.

(4) *Willock v. Smith*, 2 Camp. 184. *Clarkson v. Doodds*, *ibid.* n. *Decharme v. Lane*, 2 Camp. 324.

*Radmore v. Gould*, Wightw. 80.

*Gardner v. Slack*, 6 Moore, 489.

(5) *Poole v. Bell*, 1 Star. 598.

(6) *Berks v. Wigan*, 1 V. & B. 221.

(7) *Brickwood v. Miller*, 1 Meriv. 6.

With respect to the *service* of the notice — service on the assignees in person is not necessary, a delivery of the notice to their *attorney* being the best for all practical purposes, and being also the proper mode of service; for leaving it with a *servant* at the dwelling-house even of the assignee is not a good service. (1) In a suit in equity, service of the notice may be proved by affidavit upon the hearing of the cause. (2) The notice on the part of the defendant is not to be considered as part of his evidence in the cause, but should be proved at the beginning of the trial; and as soon as the commission and proceedings are produced by the plaintiff, the Court will then immediately compel the latter to support the commission, in the same manner as he was formerly obliged to do, viz. by strict proof of the petitioning creditor's debt, and the other requisites. (3)

Where notice given.

As to service and proof of notice.

With respect to proof of the *petitioning creditor's debt*, (as to the *validity* of which the reader is referred to a former chapter (4)) — it must be proved, in the first place, to have been contracted *prior* to *some* act of bankruptcy committed by the bankrupt (5); and it requires also to be substantiated by the same kind of evidence, as would be required in an action by the creditor against the bankrupt himself. Therefore, where the debt arose upon a bond, an acknowledgment of the bankrupt to a witness, that he owed the debt upon which the commission was sued out, will not supersede the necessity of calling the subscribing witness. (6) So, if the debt of the petitioning creditor is on a bill of exchange, drawn by the bankrupt and indorsed by him to the petitioning creditor — besides adducing evidence that it was indorsed before the commission — it will be necessary, in order to prove the debt, to go regularly through the several proofs required in an action by an indorsee against

As to proof of the petitioning creditor's debt.

Where on a bond.

Bill of exchange.

(1) *Howard v. Ramsbottom*, 10 Taunt. 526.

(2) Section 91.

(3) *Decharme v. Lane*, 2 Camp. 4.

(4) See ante, Ch. IV.

(5) See Section 19. *Ex parte Wainman*, C. B. L. 23.

(6) *Abbott v. Plumbe*, 1 Doug. 216.

*Petitioning  
creditor's  
debt.*

*Promis-  
sory note.*

*Banker's  
check.*

*Accept-  
ance of  
bill, where  
notice to  
prove the  
consider-  
ation.*

the drawer. For instance, it must be shown that the drawer had sufficient notice of the dishonour of the bill, or that the notice of the dishonour was, under the circumstances of the case, dispensed with. And, for this purpose, an acknowledgment by the bankrupt (the drawer) in a conversation between him and the petitioning creditor (the indorsee or payee) — that the bill would not be paid, but would come back to him — has been deemed sufficient evidence, although the acknowledgment was made *after* the act (1) of bankruptcy. So, the date of a promissory note, which was relied on as the petitioning creditor's debt, (where the note was *made* by the bankrupt *prior* to the act of bankruptcy) has been considered as presumptive evidence that the note existed before the act (2) — though in this case it was held, that no declaration of the bankrupt *subsequent* to his bankruptcy would be admissible in evidence to prove it. But where the petitioning creditor had, upon an application for a loan from a bankrupt, delivered to him a check on his bankers for 100*l.*, which check had got back again to the hands of the petitioning creditor, as if satisfied, but he was unable to give positive proof that the check was *actually paid*, — the check of itself was in this case held not sufficient evidence of a petitioning creditor's debt. (3) So, where the proof of the debt rests merely upon the *prima facie* evidence of the acceptance of a bill of exchange by the bankrupt, and the defendant gives the assignees notice to prove the consideration, it will be advisable for them to do so; for, though a plaintiff generally is not bound to prove the consideration for the defendant's acceptance, yet if there are circumstances of suspicion as to the consideration, and the plaintiff has notice that he will be required to prove it, the jury may pronounce the debt collusive, though no direct evidence is given to impeach the acceptance; for they have a right to

(1) *Brett v. Levett*, 13 East, 213.

(3) *Bleasby v. Crossley*, 2 Car.

(2) *Taylor v. Kinlock*, 1 Star. ring. & P. 215.

require, from the aspect of the whole transaction, something to corroborate the *prima facie* proof of hand-writing. (1) And where the petitioning creditor is the indorser of a bill or note, the *date* of the instrument then affords no presumption as to the commencement of the debt; but the actual *time* of the indorsement in this case is material, and ought to be satisfactorily proved. (2)

Where no-  
tice given.

An acknowledgment by the bankrupt, that he owed the petitioning creditor 100*l.* before the act of bankruptcy—though such acknowledgment might be made on the very day the act of bankruptcy was committed, or indeed at any time before the suing out of the commission—was held by Lord Kenyon sufficient evidence of the existence of the debt. (3) But this position, as well indeed as the case of *Brett v. Levett*, appears to be considerably shaken by subsequent decisions; in which the rule seems to be laid down, that declarations or admissions made by the bankrupt *after* the act of bankruptcy, are not admissible evidence on the part of the assignees in support of the commission. (4) And where, on an indictment against a bankrupt, the petitioning creditor's debt was alleged to be due to A., B., and C., surviving executors of D.,—it was ruled to be necessary (besides proving them to be executors) to show, that they *all assented* to act in discharge of the debt—and that a general admission by the bankrupt, of a debt due to the executors of D., would not supply the defect. (5) But, as the bankrupt's declarations before the act of bankruptcy are admissible evidence in support of the petitioning creditor's debt, so they are likewise evidence to disprove it. Thus, in an action by the assignees against the sheriff, the bankrupt's declarations before the bankruptcy—showing that the commission had been founded

As to ac-  
knowledg-  
ment of the  
debt by the  
bankrupt.

- (1) *Abraham v. George*, 11 Price, 3.      *Watts v. Thorp*, 1 Camp. 376.  
       *Taylor v. Kinlock*, 1 Star. 176.  
 (2) *Rose v. Rowcroft*, 2 Camp. 5.      *Smallcombe v. Bruges*, 13 Pri. 136.  
       *Sanderson v. Laforest*, 1 Carring, 46.  
 (3) *Dowton v. Cross*, 1 Esp. 168.  
 (4) *Robson v. Kemp*, 4 Esp. 233.      (5) *Rose v. Barnes*, 1 Star. 243.

**Petitioning  
creditor's  
debt.**  
——

in a collusion between himself and the petitioning creditor to create an apparent petitioning creditor's debt—are receivable in evidence against the assignees, though the petitioning creditor was not one of the assignees under the commission. (1)

**Entries in  
books, &c.**

An entry in the bankrupt's books (2), or an account signed by the bankrupt—in either of which he charges himself with a balance brought over on a day *before* the bankruptcy—will be admissible evidence of the debt, provided it is shown, that the entry was *made*, or the account *allowed*, by the bankrupt *before the bankruptcy*; but this must be proved by extrinsic evidence, and independent of the writing. (3) It will not, however, in any case be absolutely necessary to prove, that the debt continued from the period when it was so admitted, down to the time of the bankruptcy; for when it is shown to have once existed prior to the act, its continuance will be presumed. (4) But where it was necessary to prove a good petitioning creditor's debt on the 20th *May*,—it was held not sufficient to show, that on the 20th *January* preceding a sum of 700*l.* was due from the bankrupt—there being *subsequent* receipts and payments and other continuing transactions between the petitioning creditor and the bankrupt; for after a period of three months it was considered impossible to say, under these circumstances, whether 1000*l.* or 5*l.* was really due. (5)

**Deed of  
reference  
between  
partners.**

Where a petitioning creditor's debt was to be proved, by a deed of reference between himself and other persons (with whom he had been in partnership, and one of whom was the bankrupt) of all accounts between them, or any two of them, and also by an award of a separate debt of above 100*l.* due from the bankrupt to the petitioning creditor;—it was held, that it was not sufficient to prove the

(1) *Thompson v. Bridges*, 8 Taunt. 336. 9 Moore, 376.

(2) *Ewer v. Preston*, Rep. temp. Hard. 378. *Walls v. Thorpe*, supra.

(3) *Hoare v. Coryton*, 4 Taunt. 560.

(4) *Jackson v. Irwin*, 2 Camp. 50.

(5) *Grealey v. Price*, 2 Carring. & P. 48.



execution of the deed by the petitioning creditor and the bankrupt, without proving also the execution of it by the *other partners*, by whom it appeared on the face of it to have been executed: for that the consideration of each to execute his own submission was the submission of all the others; and without proof of that, the arbitrators had no authority to make their award between any of the parties. (1)

*Where notice given.*

Where the action is between *third parties*, but the assignees are virtually parties to the suit—as in an action by a third person against a sheriff for a false return of *nulla bona*, which the assignees give instructions to defend, on the ground that at the time of the levy the party was a bankrupt—a declaration by the petitioning creditor (who was also in this case one of the assignees) made even *subsequent* to the suing out of the *commission*, that the bankrupt did not in fact owe him 100*l.*, has been held admissible evidence of there being no petitioning creditor's debt to support the commission; on the ground that, though the petitioning creditor once swore to the existence of a debt of 100*l.*, he might, upon a further investigation of the accounts, have found that he was mistaken. (2) And in a similar case, where the petitioning creditor was not one of the assignees, Sir J. Mansfield said, “he had no doubt that the admission of a petitioning creditor, as to any fact respecting his debt, was good evidence against the debt.” (3) These decisions are, however, contrary to the principle laid down by Lord Eldon in several cases, viz. that the petitioning creditor is pledged to the validity of the commission, and ought not to be permitted to controvert a proceeding which originates from himself (4); and they are also inconsistent with another case in the Common Pleas, where it was held that the petitioning creditor was estopped, by his affidavit of debt on suing out

*Declarations of petitioning creditor.*

(1) *Antram v. Chace*, 15 East, 509. *Harmer v. Davis*, 1 Moore, 500. contra.

(2) *Dowden v. Fowle*, 4 Camp. 386. (4) *Ex parte Glossop*, 2 Rose, 386. *Ex parte Jackson*, *ibid.* 188.

(3) *Young v. Smith*, 6 Esp. 121. *Ex parte Graves*, 1 G. & J. 86.

**Trading.**

the commission, from contending afterwards that the debt was insufficient to support it. (1) And though some of these cases appear to have been decided on the principle of estoppel, and others on that of the competency of a witness, it does really seem impossible to reconcile the decisions.

**As to proof of trading.**

With respect to the different trades and callings, which *eo nomine* render a man liable to be made a bankrupt, and the different acts which constitute in law a *trading*, the reader is referred to a former chapter. (2) It may suffice here to observe, that where particular employments or callings are not specified in the statute, the general description in it of persons liable to become bankrupt cannot be satisfied, unless there be proved acts *both of buying and selling* (3), or of buying and letting for hire—except, indeed, where the trading sought to be established is by any of the new general modes of trading specified in the statute—such as the using the trade of merchandize by way of *commission* (4), or by the *workmanship of goods or commodities*—in which case, *both* the acts of buying and selling, or of buying and letting for hire, may be held unnecessary to be proved. And whether a person of a particular description has used the trade of merchandize, in the sense which the legislature has affixed to the term—or whether a person once in trade has actually ceased his trading—are both questions for the determination of the judge upon the several facts found by the jury.

**By a farmer.**

Where the person belongs to a class which is excluded by the statute, as if he is a farmer, (who may notwithstanding, as we have formerly seen, be a bankrupt, though

(1) *Harmer v. Davis*, 7 Taunt. 577.

(2) Chap. II.

(3) See Section 2. and Lord Ellenborough's judgment in *Sutton v. Weeley*, 7 East, 448.

(4) Before the new act, a person receiving a commission from a mer-

chant for the orders he procured for goods, and not being debited with the goods himself, the goods being supplied by the merchant to the customer, was held not to be a trader. Per Abbott C.J. *De v. Lawrence*, 2 Carring. & P. 154.

not in the capacity or character of a *farmer*)—the question for the jury will be, whether the acts of buying and selling were incident to the enjoyment of the farm, or were done collaterally, and with a view to profit. (1) To resolve this question, the important consideration will be, what was the nature of the acts themselves, and the use to which the bought articles were applied. The acts of buying and selling may be so frequent and so extensive, as evidently to have no reference to the business of *farming*; and may also be transacted so publicly, and with such a manner and semblance of trafficking, as to show a manifest intention in the party to hold himself forth as a *general dealer* in the articles bought and sold. On the other hand, they may be only occasional acts, or incidental to the occupation of the farm; in which case, the supposition of his being a general dealer in those articles, or of seeking his livelihood by buying and selling them, will be wholly negatived. Buying, also, for the express purpose of selling again is not decisive of the question, (though in one case great stress was laid upon such evidence (2)); for it may be incidental to the occupation of the farm, and to the farming business. The true question, indeed, will always be, whether the farmer bought with a view to make a profit as a trader, independently of the occupation of his farm. (3)

*Where notice given.*

Under the words "*Dealer and Chapman*" commonly used in a commission, and the general statement that the bankrupt got his living by *buying and selling*, evidence may be given of any species of trading. (4) Thus, where such general words were used in a commission, evidence of "*dealing in sheep*" was held admissible, though the commission described the bankrupt as "*a dealer in cattle*." (5) And an acknowledgment by the bankrupt, that he was in *partnership with*

Proof under words "*dealer and chapman*."

Acknowledgment of partnership.

(1) *Stewart v. Ball*, 2 N. R. 79.

(2) *Bartholomew v. Sherwood*, 1 N. R. 578. in note; but see *Stewart v. Ball*, 2 N. R. 81. per Chamberlain J.

(3) *Patten v. Browne*, 7 Taunt.

409.

(4) Ex parte *Herbert*, 2 Rose, 248. 2 V. & B. 299. *Hale v. Small*, 2 B. & B. 25.

(5) 2 B. & B. 25.

**Act of  
bank-  
ruptcy.**

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*another* as a trader, coupled with proof of his having given directions in the concern, has been held sufficient evidence to constitute a trading, though no express act of buying and selling during the partnership, as to *him*, could be established in evidence. (1) In a late case, however, at *Nisi Prius*, Lord Chief Justice Best entertained some doubt as to the correctness of this decision, though he received the proof, giving the defendant leave to move to enter a nonsuit. (2)

**Proof of  
act of  
bank-  
ruptcy.**

The next fact to be proved is, that the bankrupt has committed an *act of bankruptcy*. The several acts of bankruptcy, some one of which it will be necessary to establish in evidence, have been already enumerated in a former part of this work. (3) The greater portion of them, and indeed *all* those specified in the 3d section, must be "*with intent to defeat or delay creditors;*" therefore the *intention* of the party in doing the act, *and not the consequence* of it, is the criterion to determine whether it amounts to an act of bankruptcy or not. Thus, though no creditor be *in fact* delayed, still the conduct of the party plainly manifesting an *intention* to delay his creditors, will constitute a positive act of bankruptcy (4), which does not require the intent to be productive of the effect. The intention will be, of course, more or less apparent, according to the varying circumstances of each particular case. In general, the previous conduct of the bankrupt, and his declarations *at the time* of the state of his affairs, are the strongest indications of what his motive is, in doing or suffering the act insisted upon as an act of bankruptcy. And though the delay of creditors was not the *immediate* or *principal* object of the party, yet (as has been before remarked (5)) if that proves to be the *necessary consequence* of his proceeding, it will be evidence of his intent, upon

(1) *Parker v. Barker*, 1 B. & B. 9. 3 Moore, 226.

(2) *Bromley v. King*, 1 Ryan & M. 228.

(3) Chap. III.

(4) *Ante*, page 48.

(5) See *ante*, page 45.

the principle that every man must be presumed to foresee and intend what is the inevitable consequence of his own act. (1) *Where notice given.*

The act of bankruptcy by *beginning to keep house*, we have before seen (2), is usually proved by *denial* to a creditor when the party is at home, such denial being authorized by the bankrupt. But this, it will be recollected, is merely as a medium of proof, and is not the *only* evidence of the fact; for if a trader has no clerk or servant, the act cannot in that case be evinced through such a medium. Therefore, where a trader shuts himself up in his house, or secludes himself in any private apartment for the purpose of avoiding the fair importunity of his creditors, who are thus deprived of all means of communicating with him, he *begins to keep house* within the meaning of the statute, and commits an act of bankruptcy. (3) For the denial to the creditor, as it is the cause of delay to him, is merely (like every other act which necessarily produces such a consequence) presumptive evidence of the bankrupt's *intention* to effect that delay, and not (abstracted from all intention and design) a specific act of bankruptcy in itself. A denial to several persons whom the bankrupt's servant did not know, but whom from their frequent calling she believed to be creditors of the bankrupt, is evidence to go to the jury, to say whether they were so or not (4); as well as a denial to only *one* person calling to make inquiries about a dishonoured bill of exchange, and whom the bankrupt believed to be a creditor. (5) So, it is for a jury to say, whether the bankrupt denied himself for the real purpose of delaying his creditor, or because he called at an unseasonable hour. (6) *Keeping house.*

(1) Per Lawrence J. *Fowler v. Budget*, 7 T. R. 516. Per Lord 59.  
*Denborough, Ramsbottom v. Lewis*, 1 Esp. 279. Per Gibbs C.J. *Hol- 381.*  
*d v. Whitehead*, 3 Camp. 530. (5) *Bleasby v. Crossley*, 2 Car-  
 (2) See ante, 55. ring. & P. 215.  
 (3) *Dudley v. Vaughan*, 1 Camp. (6) *Hughes v. Gillman*, *ibid.* 32.;  
*Castell's Bankruptcy*, cit. and see ante, 58.

*Act of  
bank-  
ruptcy.*

*As to ad-  
missibility  
of the  
bankrupt's  
declar-  
ations.*

It may be proper, under this act of bankruptcy, to consider in what cases the *bankrupt's declarations* are receivable in evidence; which are admitted only upon the principle, that what a party says at the time of doing an act is evidence for the purpose of showing its true nature and character. Thus the declarations of a bankrupt at the *time of quitting* his dwelling-house, or immediately subsequent, are admissible in evidence, in order to show the motive of his departure; for it is the *intent* with which he departed that constitutes the act of bankruptcy. (1) So his order to a servant to deny him to a *creditor* is (as we have before seen), for the same reason, evidence of the intent of his being denied. The declarations, also, of the bankrupt *the day after his return home*, have been held admissible in evidence of the motive of his absence (2); for, as the whole absence from his dwelling-house is but one act of bankruptcy, there seems to be no reason why declarations made so soon after his return should not be considered as much a part of the transaction, as declarations made just previous to his departure. And it has been well observed by the late Sir William Evans, in his edition of *Pothier* (3), that the conversation of a person on his return home naturally connects itself with the occasion of his absence, and is an indication of the existing state of his mind; and that wherever the expressions can be so connected with the actions, as to be regarded as the mere result and consequence of the co-existing motives, they form a proper criterion for judging of the person's intention and conduct. But Mr. Phillipps, in his treatise (4) on Evidence, very properly adds to this remark, that it would be too much to infer generally from the above decision, that the declarations of a bankrupt, made *at any time afterwards*, can be admitted as evidence

(1) *Ambrose v. Clendon*, Rep. temp. Hard. 267.

(2) *Bateman v. Bailey*, 5 T. R. 512.

(3) Vol. ii. 285.

(4) Vol. i. 278.

to explain an antecedent absence, or any other past transaction which is completely finished. Such statements, indeed, concerning past transactions are in general wholly inadmissible, as they form no part of the *res gestæ*. And if there is any *uncertainty of the time* when a declaration of this kind is made, it cannot then be received in evidence; as where a deposition stated, that the bankrupt had absented himself, and had admitted that he had done so for the purpose of avoiding his creditors — but specified *no time* when such admission was made, — it was held not even *prima facie* evidence of the act of bankruptcy. (1) In a recent case, also, where the declaration was made a *few days after* the alleged act of bankruptcy, Lord C. J. Abbott held that it was inadmissible. (2)

*Where notice given.*

Where the act of bankruptcy insisted upon by the assignees is a *fraudulent grant or conveyance*, and the deed is produced in evidence, the execution must be proved in the ordinary course by a subscribing witness. An admission by the defendant of the execution of the deed will not dispense with this evidence, not even if the defendant is a party to the deed (3); for though a party may acknowledge a deed, yet he may not know every circumstance attending the execution; and the subscribing witness may be cognizant of a fact, not within the knowledge or recollection of a party to the deed, but of which he is nevertheless entitled to avail himself. (4) And, notwithstanding the defendant at the trial should himself produce the deed in compliance with a notice, this also is held to be not a sufficient ground for dispensing with the ordinary proof (5) — though such was at one time considered to be the rule (6): — for the mere possession of an instrument by one party does not, in general, relieve the other from calling the subscribing witness. But if the defendant (in pursuance of a notice) produces a

Fraudulent grant or conveyance.

(1) *Marsh v. Meager*, 1 Star.

(4) Per Le Blanc J. 4 East, 53.

(2) *Schoeling v. Lee*, 3 Star. 149.

(5) *Gordon v. Secretan*, 8 East, 548.

(3) *Abbot v. Plumbe*, 1 Doug.

(6) *Rex v. Middlezoy*, 2 T. R. 43.

*Bowles v. Langworthy*, 5 T. R. 366.

*Act of  
bank-  
ruptcy.*

deed to which he is not only a party, but *under which he holds property, or claims any beneficial estate*, it will then not be necessary that the plaintiff should call an attesting witness to prove the execution. (1) And upon this principle, it seems, that where a fraudulent bill of sale is given by the bankrupt to the defendant, the admission by the defendant of the execution of the deed, in his examination before the commissioners, would (in an action of trover brought by the assignees to recover the property claimed by the defendant under the deed) supersede the necessity of calling the subscribing witness. (2) A fraudulent conveyance cannot be read to prove an act of bankruptcy, if it has not the proper stamp affixed to it. (3)

*Fraudu-  
lent trans-  
fer.*

In order to shew that a grant or transfer to a creditor is really *fraudulent*, the assignees must prove, first, that it was made on the eve of bankruptcy; secondly, that it was made in contemplation of bankruptcy; and, thirdly, that it was made voluntarily, and for the purpose of favouring the creditor. (4) Whether a *transfer of goods* is made in *contemplation of bankruptcy* is collected from various circumstances, such as the secrecy of the transaction, the unreasonable hour at which the goods are removed from the bankrupt's premises, the proximity of the transfer to the time of the bankruptcy, and many other matters which may shew what was the *intent* of the bankrupt in making the transfer, and what was his knowledge of his own insolvency. (5)

*Lying in  
prison.*

To prove the act of bankruptcy by *lying in prison* (6), the detention, and the cause of the detention, must be shewn. The former may be proved by producing the prison books, containing entries of the dates of the several commitments and discharges to and from the prison (7);

(1) *Pearce v. Hooper*, 3 Taunt. 62. *Orr v. Morice*, 3 B. & B. 139.

(2) *Bowles v. Langworthy*, 5 T. R. 366.

(3) *Whitwell v. Dinsdale*, Peake, 168.

(4) See ante, 63. et seq. 71. et seq.

(5) See ante, Chap. XI. Part 2. Sect. 6.

(6) See ante, 76. et seq.

(7) *Rex v. Aickles*, 1 Leach, 456.



but they are not evidence of the *cause* of the commitment, for the *committitur* itself is higher proof, and if in existence ought to be produced. (1)

*Where notice given.*

The assignees will not upon the trial be tied down to proof of the *specific* act of bankruptcy, upon which the commission was founded, being at liberty to repudiate that, and rely upon any other. (2) Some act of bankruptcy, however, must be proved to have been committed *before* the issuing of the commission, and *after* the contracting of the petitioning creditor's debt (3); and if that is proved, it is immaterial how recently it was committed before the commission issued (4) — or *how many* acts of bankruptcy have been committed by the bankrupt. (5)

Assignees not tied down to proof of any specific act.

But where the Lord Chancellor directs an issue, or an action at law, — though he will generally permit other acts of bankruptcy to be given in evidence, yet as this is considered an indulgence to the party seeking to support the commission, that party will be required to state by affidavit upon *what particular acts* of bankruptcy he relies (6); and to give notice to the other party, by what evidence he intends to prove his case. (7) Upon one occasion, indeed, where the commission was proved (on the trial of an issue) to have been founded on a concerted act of bankruptcy, Lord Chancellor refused to direct another issue with liberty to prove other acts. (8)

Practice where Lord Chancellor directs an issue.

Where the issuing of the commission and the act of bankruptcy happen on the same day, evidence is then admissible against the assignees to shew that the commission was issued (that is, sealed) prior to the act of bankruptcy. (9) A verdict upon an issue directed out of Chan-

Where act of bankruptcy and commission on same day.

*Salte v. Thomas*, 3 Bos. & P.

(5) Section 19.; and see *Bryant v. Withers*, 2 M. & S. 131. *Donovan v. Duff*, 9 East, 21. *Rex v. Bullock*, 1 Taunt. 94.

*Reed v. James*, 1 Star. 134. 79.

*Ex parte Wainman*, C. B. L.

(6) *Ex parte Burgess*, Buck. 235.

*Topper v. Richmond*, 1 Star.

(7) *Ex parte Bogen*, *ibid.* 137.

(8) *Ex parte Prosser*, Buck. 77.

(9) *Wydown's case*, 14 Ves. 80.

*Act of  
bank-  
ruptcy.*

Where  
commis-  
sion  
against  
several  
partners.

cery, to which only one of the defendants was a party, may be received against all the defendants to prove the time of the act of bankruptcy. (1) If the commission is against *several partners*, each must be proved to have committed an act of bankruptcy; for the act of one, in this respect, will not bind the rest — though he is the only one transacting the business, and residing at the place where it is carried on. (2)

It is to be remembered, we may observe once more, that all the preceding observations as to the proof of the *petitioning creditor's debt, the trading, and the act of bankruptcy*, will only apply where the party in the action is entitled to give, and has duly given, *notice* of his intention to dispute the validity of the commission.

Proof of  
issuing of  
the com-  
mission.

The next link to be considered in the chain of evidence (though it is in practice offered as the first in order of proof at the trial) is the due issuing of the commission; and this it will be incumbent on the assignees to prove, whether the defendant gives notice or not, of his intention to dispute the three preceding matters of proof. To establish this, it will be necessary to produce the original commission under the Great Seal. (3) But now, by *section 96.* of the new statute, no *commission, or adjudication* of bankruptcy, or *assignment* of the personal estate of the bankrupt, or *certificate* of conformity, is receivable in evidence in any court of law or equity, unless the same respectively shall have been first entered of record at the Bankrupt Office. The Great Seal therefore of the kingdom, which has been hitherto considered the most solemn mode of authenticating any instrument, appears to be no longer sufficient evidence to verify a commission of bank-

(1) *Lowfield v. Bencroft*, Bull. N. P. 40.

(2) *Mills v. Bennett*, 2 M. & S. 556.

(3) In Buller's *Nisi Prius*, as well

as most of the other books, it is added, "And the petition to the Chancellor on which the commission was granted;" but this does not seem to be necessary.

rupt; but the commission must now have a certificate indorsed thereon, purporting to be signed, either by the person appointed by the Lord Chancellor to enter of record matters relating to commissions of bankruptcy, or by his deputy; which certificate is, without any proof of the signature (1), declared to be receivable as evidence of the commission having been so entered of record. When, however, a commission is superseded, the writ of *supersedeas* (reciting that a commission issued on a day certain) is evidence to shew that such a commission issued on that day, even against a party who is both a stranger to the writ and to the commission; for a commission of bankruptcy is considered, in law, as a proceeding to which all the world are parties. (2) If it be alleged in pleading, that the commission issued “under the Great Seal of *Great Britain*,” it is no variance that it is, in fact, issued under the Great Seal of the *United Kingdom*. (3) But it is a fatal variance to allege, that the party sued the commission *out of the High Court of Chancery*. (4)

*Where notice given.*

Variance.

The bankrupt being not divested in law of any of his property, until an assignment is executed (5) by the commissioners of his estate and effects, (which, when once made, vests the personal property in the assignees from the time of bankruptcy (6));—the assignment, therefore, becomes an important document to be proved, in order to complete proof of the title of the assignees; though, by the courtesy of practice in the Court of King’s Bench, it is generally admitted on the trial, unless there are substantial objections to the contrary. (7) When proof of it is insisted on, it must be proved in the regular manner, by producing the deed, and calling the attesting witness to prove execution of it. But where the assignees produce the

Proof of assignment.

**Section 96.**

*Gervis v. Western Canal Com-*  
5 M. & S. 76.

*Rex v. Bullock*, 1 Taunt. 71.

*Poynton v. Forster*, 3 Camp.

58. 1 Rose, 222.; and see ante, 137.

(5) And see ante, 320.

(6) 2 Rep. 26. a.

(7) *Read v. Cooper*, 5 Taunt. 89.

*Act of  
bank-  
ruptcy.*

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assignment under a notice from the other party, it is then admissible in evidence for that party, without proof of the execution by the subscribing witness, if the assignees claim any benefit (1) under the assignment. The assignment must (as well as the commission) have the proper certificate indorsed of having been entered of record at the Bankrupt Office, before it can be read in evidence.

*Proof of  
bargain  
and sale.*

With respect to actions relating to the bankrupt's *freehold property*, (which, as we have already seen, does not pass by the general assignment of the commissioners) — the title of the assignees is to be substantiated by producing the bargain and sale to them from the commissioners, and proving its execution in the ordinary way. But, unless the commissioners execute the power with which they are invested in the precise manner prescribed by the statute, it will have no effect in passing the estate. (2) The deed must, therefore, appear to have been enrolled in some court of record (3); and this must be done within six months after the date of the deed, according to the express provision of the statute of the 27 H. 8. c. 16. relating to the enrolment of bargains and sales. (4) The enrolment may be proved by a certificate on the bargain and sale signed by the proper officer, which will be evidence also of the *time* when it was enrolled (5); for the indorsement is considered as part of the enrolment, which being a record, is therefore conclusive as to the time. (6) And, as the enrolment of the deed thus becomes a record, the deed may likewise be proved by an *examined copy* of the enrolment, signed by the proper officer; and the *time* of the enrolment may, in like manner, be proved by an examined copy of the officer's indorsement on the enrolled deed. (7)

(1) *Pearce v. Hooper*, 3 Taunt. 62. *Orr v. Morice*, 3 B. & B. 139.

(2) *Perry v. Bowes*, Sir T. Jones, 196. *Bennet v. Gandy*, Carth. 178. *Elkott v. Dunby*, 12 Mod. 3.

(3) Section 64.

(4) 2 Phill. 288.

(5) *Kinnerdaley v. Orpe*, 1 Doug. 56. 58.

(6) *Rex in aid of Reed v. Hopper*, 3 Pri. 495.

(7) See 1 Phill. 388. 499. 2 Phill. 288.

No *stamp* is any longer necessary to give validity to the commission, or the assignment, or indeed to any other document or conveyance relating *solely* to the estate or effects of the bankrupt.

Where no-  
tice given.

No stamp  
necessary.

## SECTION II.

*Where the Defendant is not entitled to give Notice to dispute the Commission.*

In all actions brought by the assignees for any debt or demand, for which the bankrupt himself could have sued, if his bankruptcy had not intervened — unless the bankrupt as given the notice before mentioned (1) of his intention to dispute the commission — the *depositions* taken before the commissioners at the time of or previous to the adjudication, will be *conclusive* (2) evidence of the petitioning creditor's debt, the trading, and the act of bankruptcy — that is, provided the facts stated in the depositions amount to such proof of those several matters as is required by law. For, when the time given by the statute to the bankrupt to dispute the commission is elapsed, the defendant in the action then have no right to force the assignees to give formal proof of these several matters. But an action brought by assignees, to recover back the payment of a debt made by the bankrupt to a creditor after his knowledge of an act of bankruptcy, or after the issuing of the commission — for which the *bankrupt himself* could, of course, have no right to sue — would not be such an action as would deprive the defendant of his right at any time to dispute these matters, on giving the requisite notice of his intention to do so.

Where  
the deposi-  
tions are  
conclusive  
evidence.

The term (3) *conclusive* must be understood to apply to several facts contained in the depositions, and not to

How far  
the depo-  
sitions are

See ante, 758.

Section 92.

Before the new statute, it was held, that a party could call

witnesses to contradict the facts stated in the depositions. *Ellis v. Shirley*, 3 Camp. 424. *Brown v. Forrestall*, 1 Holt, 190.

*Depositions.*

*conclusive evidence.*

the *conclusions of law* drawn by the witnesses, or by the commissioners, from those facts. For though no witness can be called upon the trial to contradict the *facts* deposed to (1), yet if the depositions, *upon the face of them*, are not legal proof of a petitioning creditor's debt, trading, and act of bankruptcy, they cannot be received in evidence, notwithstanding those matters have been found by the commissioners. (2) Thus, though the deposition (of the witness to prove the act of bankruptcy) will be conclusive evidence *of the time* when the bankrupt did a certain act, and of the fact itself, it will not be evidence of its amounting to an act of bankruptcy. So the deposition of the petitioning creditor will be evidence of a certain sum due to him, and also of the character in which he claimed it, whether as executor, or assignee—nor will it be necessary in either of these cases to produce the probate, or the assignment (3); but, whether the sum due was a *debt to support a commission*, — *that* is an inference of law, which the Court upon the trial will not be estopped from determining, by the adjudication of the commissioners. So, if a deposition state, that the deponent witnessed the execution of a deed by the bankrupt, by which he assigned his property to A. B., — though this is evidence of such a deed as stated in the deposition (4), yet it is not evidence that the deed itself was an act of bankruptcy.

The whole effect, indeed, of the provision of the statute is, only to make the depositions evidence — not to admit the fact of the bankruptcy to be proved; for this must be as strictly made out by the depositions, as it would be required to be done by witnesses. (5) If the facts, therefore, stated in the depositions, are sufficient of themselves to sustain the bankruptcy, no farther proof is necessary (6); but they may be always objected to

(1) See *Humphries v. Coggan*, 1 Rose, 226.

(2) *Clarke v. Askew*, 1 Star. 458.

(3) *Skaipe v. Howard*, 2 B. & C. 560.

(4) *Kay v. Stead*, 2 Star. 200.

(5) *Rawson v. Haigh*, 1 Carring.

80.

(6) Per Abbott C. J. 2 B. & C. 560.

for not proving the subject-matter to which they apply. Thus, if the deposition of the petitioning creditor state only, that the debt was due to him at and *before the time of suing forth the commission* — not showing that it existed at the time of the act of the bankruptcy — this would be defective proof of the petitioning creditor's debt. (1) So, upon a commission sued out against the drawer of a bill of exchange, if the deposition does not state presentment and notice, there will not be sufficient evidence of the debt. (2) And again, where the deposition of the witness to prove the act of bankruptcy stated, that the party absented himself on a certain day, and that he had declared to the deponent that his motive was to avoid his creditors — but *not stating the time* when this declaration of the bankrupt was made, — this was ruled not to be sufficient proof of an act of bankruptcy. (3)

*Where not entitled to give notice.*

In every case, however, where the depositions turn out to be insufficient proof of any of the requisites to support the commission, the assignees will not be prevented from calling witnesses to establish these facts by other evidence. (4)

Defective depositions may be supplied by other evidence.

The deposition of the petitioning creditor, being expressly made evidence by the statute (5) of the several matters contained in it, is admissible at the trial in proof of his debt (6); though, if he himself were called, he would not be a competent witness to support the commission. (7) And in one of the cases before mentioned (8), the deposition was holden to be evidence, that the petitioning creditor was *executor* of the party with whom the bankrupt contracted the debt, though parol evidence of that fact

Deposition of petitioning creditor.

(1) *Clarke v. Askew*, 1 Star. 458.;  
see *Lawton v. Robinson*, *ibid.*

(4) *Clarke v. Askew*, 1 Star. 458.

(5) Section 92.

(6) *Bisse v. Randall*, 2 Camp.

*Cooper v. Machin*, 1 Bing. 493.

(7) *Green v. Jones*, 2 Camp.

*Marsh v. Meager*, 1 Star. 411.

and see ante, 771.

(8) *Skaipe v. Howard*, ante, 778.

would not otherwise have been admissible, — but the probate must have been produced. (1)

And see further, as to the admissibility of the depositions generally in evidence, post, section 5.

### SECTION III.

*Where no Notice has been given to dispute the Commission.*

Where *no notice* has been given by the other party to the action, to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy, it will now be sufficient for the assignees merely to prove the *commission* and the *assignment* (2), without any further proof of their title to sue as assignees; the present statute (as has been before observed (3)) differing materially in this respect from the 49 G. 3. c. 121. sect. 10, 11., which only declared that the proceedings should in such case be admissible.

Infant defendants not bound as to notice.

As to undertaking on retaining venue.

*Infant* defendants, however, in a suit in equity will not be bound by not giving notice, — but strict proof will be required as against them. (4)

Where a plaintiff retains the venue upon the usual undertaking to give material evidence within the county, — if, in this case, the plea and issue be such as to render such evidence irrelevant, the performance of the undertaking is dispensed with. Therefore, if the local evidence be the trading and the petitioning creditor's debt, yet if the defendant do not give notice of his intention to dispute the commission, it seems that the undertaking need not be complied with. (5)

Strict proof required as

But whether notice is given or not to dispute the commission, yet in all proceedings against the *bankrupt*, either

(1) See *Doe v. Liston*, 4 Taunt. 741.

(2) See ante, 774, 775.

(3) Ante, 758.

(4) *Bell v. Tinney*, 4 Mad. 572.

(5) *Soulsby v. Lea*, 3 Taunt. 86.



criminal or civil, strict proof will be required of the requisites to support it; and the depositions in this respect will not be sufficient evidence. (1) Thus, on an indictment against a bankrupt for perjury before the commissioners in passing his last examination, it has been ruled necessary to give evidence of the petitioning creditor's debt, the trading, and act of bankruptcy — although the indictment alleged, that the defendant *had been duly found and declared bankrupt*; for the authority of the commissioners takes its root, not in the commission, but in the *bankruptcy*; and unless the defendant really was a bankrupt, their examination of him would be unauthorised. (2) This strictness of proof, however, does not seem to be necessary in a criminal proceeding against *third persons*; for on a similar indictment against such a person, who had been examined before the commissioners, proof of the commissioners' adjudication was held to be sufficient. (3)

Where no  
notice  
given.

—  
against the  
bankrupt.

#### SECTION IV.

*Where no Proof of the Title of the Assignees is necessary.*

Where the defendant is by his own act estopped from disputing the title of the assignees, they will not be bound to prove any of the preceding matters, in order to support their right of action against him. As where the defendant *himself contracted* with the assignees, they may, in that case, recover against him without proving themselves to be such; for the promise of the defendant is then not a promise by mere implication of law, but amounts to an actual contract, in respect of which the plaintiffs will be entitled to recover *suo jure*. (4) And even in such a case, when the plaintiffs allege themselves *to be assignees* in the

Upon a  
personal  
contract  
with as-  
signees.

) And see post.

) *Rex v. Purshon*, 3 Camp. 96.

) *Rex v. Raphael*, per Abbott J.

Devon Spring Assizes, 1818. Man.

Index, 2d edit. 232.

(4) *Evans v. Mann*, Cowp. 569.

Where no proof of title necessary.

Or with the bankrupt after his bankruptcy.

When defendant estopped by his own admissions.

declaration, the proof of that fact appears to be superfluous, provided they establish a title to recover, independent of such averment. (1) And the same principle applies to the case, where the assignees sue upon a contract made with the defendant *by the bankrupt after his bankruptcy*; for the bankrupt being incompetent to make such contract, the assignees may adopt it as their own, and treat the bankrupt as their agent. (2)

The regular and formal proof will be likewise dispensed with, if the defendant has, by his own admissions, precluded himself from disputing the bankruptcy. Thus, in an action brought by an assignee to recover the price of some goods, which the defendant had received from the bankrupt before his bankruptcy to sell by auction, and which he had sold after the bankruptcy, — it was held, that the defendant, having described the goods in his catalogue of sale, as “*the property of Durouweray, a bankrupt*,” had estopped himself from calling the bankruptcy in question; and that this admission dispensed with the necessity of going through the different steps of proof as in ordinary cases. (3) For it was considered, that such an admission, being an express declaration by the defendant that Durouweray was a bankrupt, amounted also to an admission that the *defendant was acting under his assignees*, whoever they might be; inasmuch as the defendant must be taken to be cognizant of the law, that the bankruptcy countermanded any authority, which the bankrupt himself might have previously given for the sale. (4) So, where the defendant had purchased goods of the bankrupt — and after the bankruptcy attended a meeting of the commissioners, and exhibited an account between himself and the bankrupt, claiming certain deductions — and afterwards made a part-payment to the plaintiff, — it was held, that the defendant must be understood to have treated with the plain-

(1) Per Wood B. *Thomas v. Rideing*, Wightw. 65.

(2) *Evans v. Mann*, supra.

(3) *Maltby v. Christie*, 1 Esp. 340.

(4) Per Lord Ellenborough, 16 East, 193.

tiff as assignee; and that this was *prima facie* evidence of his being assignee, without the production of the proceedings (1); for that any recognition of a person standing in a given relation to others is *prima facie* evidence (against the person who makes such recognition) that the relation exists. So, if a defendant, on being applied to by a person whom he knows to be the collector of the bankrupt's debts for the assignees, says, "*I will call and pay the money,*" — such promise has been held to be an admission of the right of the assignees, and renders it unnecessary to give the usual proofs in support of the commission. (2) Evidence, however, of this description is not *conclusive*; and the defendant in such a case may shew in answer, that the plaintiff bore some other character than that of assignee, at the time of the payment or the promise.

Where no proof of title necessary.

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But the mere circumstance of a creditor having proved a debt under the commission is not sufficient to preclude him from disputing its validity (3); for, by proving a debt, the creditor at most only gives credit to the petitioning creditor and to the commissioners, that the former has not sued out the commission, nor the latter declared the trader a bankrupt, without proper grounds. The creditors, in general, have not the means of knowing the evidence on which the trader was declared bankrupt; and it would not be reasonable, that (by proving their debts) they should be put to the dilemma of being understood to have admitted, that every thing necessary to support the commission really existed, when they could not judge whether such acts did or did not exist. (4) If the assignees, therefore, bring an action against a creditor who has proved, and the creditor gives notice of his intention to dispute the commission, the assignees must regularly prove the petitioning creditor's debt,

Proof of a debt does not admit the validity of the commission.

*Dickenson v. Coward*, 1 B. & 191. *Stewart v. Richman*, 1 Esp.  
7. 108. *Hope v. Fletcher*, 1 Selw.  
*Pope v. Monk*, 2 Carring. & Ni. Pri. 238. contra. *Walker v.*  
2. *Barnell*, Doug. 303.  
*Rankin v. Horner*, 16 East, (4) Ibid.

*Where no proof of title necessary.*

Difference in this respect between a creditor and an assignee.

What amounts to an admission by bankrupt.

Plea of payment admission of title.

the trading, and act of bankruptcy, as in ordinary cases where those facts are disputed. Lord Eldon, however, upon one occasion expressed an opinion, that there was a great difference in this respect between a mere *creditor*, and an *assignee* under the commission; and said, if in any proceeding before him it was put to an assignee who had proved, either to admit the commission or not, and he elected to dispute it, he should require him to do so at the expense of his proof. (1)

Where a bankrupt had applied for and obtained his discharge from custody, on the ground that his detaining creditor had proved under the commission, — it was held, that he was estopped in an action against his assignees from disputing the validity of the commission; for that, having availed himself of the commission for one purpose, he could not be afterwards allowed to assert that the commission was invalid. (2)

When a defendant puts himself upon one issue in an action, he admits all the rest. Therefore, in an action of debt on bond by assignees, a plea of payment admits their title, and they need not prove themselves to be assignees. (3)

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## SECTION V.

*As to the Admissibility of the Depositions and Proceedings under the Commission.*

Having considered the general nature of the evidence required to support the commission, the next subject of inquiry relates to the admissibility in evidence of the depositions, and the proceedings in general under the commission; for of those relating to the petitioning creditor's

(1) *Ex parte Jecks*, 1 Rose, 393.

(2) *Watson v. Wace*, 5 B. & C. 155.

(3) *Corsbie v. Oliver*, 1 Star. 76.

debt, the trading, and the act of bankruptcy we have already (1) sufficiently treated.

*Of the depositions, &c.*

Before the 5 G. 2. c. 30. s. 41. the depositions of witnesses taken by commissioners of bankrupt could not be given in evidence in an action to try the question of bankruptcy — or, indeed, any other question connected with it; because in those proceedings the parties interested had not the power of cross-examining the witnesses. (2) That statute made a copy of the proceedings evidence in certain cases after being entered of record (3); and a subsequent statute (4), it has been shown, made also the depositions and proceedings themselves evidence to prove the petitioning creditor's debt, the trading, and the act of bankruptcy, if no notice was given to dispute those matters. The new statute also, as we have already seen (5), extends the admissibility of the depositions for this purpose, in actions brought by the assignees for any debt or demand of the bankrupt.

Formerly not receivable in evidence.

By the 95th section it is likewise enacted, that the Lord Chancellor may from time to time appoint a proper person, who shall by himself or his deputy (to be approved of by the Chancellor) enter of record all matters relating to commissions, and have the custody of the entries thereof. And section 96., the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be so entered of record; and upon the production in evidence of any instrument so directed to be recorded, and having the certificate thereon reporting to be signed by the proper officer or his de-

Lord Chancellor may direct depositions to be recorded.

) Ante, 778. et seq.

) *Francisco v. Gilmore*, 1 Bos. 177.

) There was a strange inaccuracy in the wording of this clause in 5 G. 2. which was first pointed out by Mr. Douglas in his Reports, 258. note (1). After the act had enacted, that copies of proceedings, when entered of

record, "and signed and attested as hereinafter mentioned," might be given in evidence, it made no provision whatever for attesting or signing the copies so made.

(4) 49 G. 3. c. 121. s. 10, 11.; and see ante, 756.

(5) Section 92.; and see ante, 777.

*Of the depositions, &c.*

*Office copies.*

*Depositions conclusive, where commissioners had authority to inquire.*

puty, the same shall without any proof of such signature be received as evidence of such instrument having been so entered of record. (1)

By section 97. it is also enacted, that in every action, suit, or issue, *office copies* of any original instrument or writing filed in the office, or officially in the possession of the Lord Chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively. And if the original shall be produced on the trial, the costs of producing it will not be allowed on taxation, unless it appears that the production of it was necessary.

When, therefore, any of the proceedings under the commission have been duly entered of record, they will be evidence of all matters contained in them, of which the commissioners had authority to inquire. Thus, as we have already seen (2), the deposition of the witness to prove the act of bankruptcy will be evidence to prove the *precise time* when the act of bankruptcy was committed; for the witness cannot tell his story before the commissioners without saying when that took place; and as he must mention the circumstance as a matter of course in his deposition, he must be taken to have spoken the truth, unless the contrary appears. (3) So, the deposition of the petitioning creditor, as has been already stated, will be evidence of a debt due to him in the *character* in which he claimed it. As if it appears, that the debt is due to him *as executor*, it is not necessary to produce the probate to prove him such; nor, where it appears to be due to him *as assignee*, is it necessary to produce the assignment. (4) So the proceedings of the

(1) The clerk of enrolments, however, (who is the officer appointed to enter proceedings in bankruptcy of record) is not intitled, as against the assignees, to a *lien* on the proceedings for his fees in this respect; but must deliver them up to the assignees

when required. *Ex parte Sanderson*, 1 Rose, 275.

(2) *Ante*, 778.

(3) *Janson v. Wilson*, 1 Doug. 257.

(4) *Skiffe v. Howard*, 2 B. & C. 560.

commissioners, when recorded, will be conclusive evidence of a *debt proved* under the commission, as against the assignees; for where the debt has once been liquidated before the commissioners, it cannot afterwards be disputed, except on an application to the great seal. (1) But where a bill was filed against assignees, who disputed the validity of a conveyance under which the plaintiffs claimed, upon the ground that it had been executed subsequently to the act of bankruptcy — and they tendered the proceedings under the commission as evidence of this fact; — the Vice-Chancellor held, that to admit the proceedings in such a case — not to sustain the title of the assignees under the commission, but incidentally to invalidate the rights of strangers — would produce the grossest injustice, in affecting the interest of a party by evidence, of which, till the moment it was produced, he was in utter ignorance — and which had been taken without any opportunity of its being met either by direct, or by cross, examination; and he therefore refused to admit the proceedings in evidence. (2) It does not appear from the report of this case, what particular document among the proceedings was tendered to disprove the title of the plaintiff, or whether the proceedings were recorded or not; but it should seem, that the deposition of the witness to prove the act of bankruptcy would, consistently with the above case of *Janson v. Wilson*, and consistently also with the construction of the present statute, have been receivable in evidence to prove the *time of the act of bankruptcy*, unless the plaintiff had given notice to dispute the commission.

*Of the depositions, &c.*  
—

As to their admissibility against a stranger to the commission.

But though the depositions and proceedings are conclusive evidence, under the 92d section, of the facts stated in them in actions by the assignees for a *debt* of the bankrupt — yet they are not *conclusive* evidence of those facts, as against the *bankrupt* himself. For though the 90th section extends to actions generally by or against any assignee or

Not conclusive against the bankrupt.

(1) *Brown v. Bullen*, 1 Doug. 407. (2) *Whitworth v. Graham*, 2 Rose, 364.

*Of the depositions, &c.*  
 —

commissioner, and declares that *no evidence* shall be required of the petitioning creditor's debt, the trading, or act of bankruptcy, unless the other party gives notice of his intention to dispute these matters, — yet in the event of the *bankrupt* bringing an action against the assignees, or the commissioners, within the period limited by the 92d section (1), the *action* itself would, it is apprehended in this instance, *be notice* of his intention to dispute the bankruptcy — and enable him to call witnesses to contradict the depositions, though he had not, in fact, given any notice to dispute the bankruptcy at the trial (2), or any actual notice within the terms of the 92d section. The depositions, indeed, as far as they relate to the validity of the commission, do not seem to be more admissible against the bankrupt in an action, than (as we have already seen (3)) they are in an indictment for perjury, where strict proof is required of all the requisites to support the commission. But if the depositions have been recorded pursuant to the terms of the 96th section, and the witnesses to prove the facts deposed to are dead, it is conceived, that the depositions would then be admissible as evidence of the facts contained in them, even against the bankrupt — leaving him still at liberty to call witnesses to contradict the depositions.

Examination of bankrupt evidence against himself.  
 So of any other party;

The *examination*, however, of the bankrupt taken before the commissioners is evidence against himself, even if the questions were improperly put to him with a view to the action (4) — and though he might have demurred to them, as exposing him to penalties. (5) So, the examination of any party, who has signed it after it was read to him, is evidence against himself (6); and it is immaterial, with respect to the question of admissibility, whether every word

(1) See ante, 758.

(2) And see *Ellis v. Shirley*, 3 Camp. 434. *Jones v. Llewellyn*, 1 Meriv. 6. (a). *Mills v. Bennet*, 2 M. & S. 556. *Cooper v. Machin*, 1 Bing. 426.

(3) *Rex v. Punshon*, 3 Camp. 96; ante, 781.

(4) *Stockfleth v. De Tude*, 4 Camp. 18.

(5) *Smith v. Beadnell*, 1 Camp. 30.

(6) *Hammond v. Myers*, 5 Ark. 415.



used by him was taken down, or only the substance of what appeared to be relevant. (1) If he refers, also, in his examination to a written document, as containing a statement of facts to which he is questioned, that document may be read as part of his (2) examination; but *parol* evidence is not permitted to explain it. (3) The examination of a *third person*, however, has been held not admissible against a party to the suit; therefore Sir T. Clarke refused to allow the examination of the defendant's attorney to be read, unless he had been examined in chief (4) in the cause. And where a creditor had taken the bankrupt's goods in execution after an act of bankruptcy, and assigned them to B.; — the creditor's examination (taken under the commission) was holden not admissible in an action by the assignees against B. (5) For the same reason, the examination of a bankrupt — taken, not in his own bankruptcy, but under *another commission* — is not (in the event of his death) evidence, upon a petition in his bankruptcy to expunge the debt (6) of a creditor. And an examination before commissioners, on an inquiry as to a debt, is not evidence on a petition to expunge the proof of a creditor, who was no party to the inquiry. (7) So, where a defendant pleaded a set-off in an action brought against him by assignees, and tendered *his own deposition* in proof of a debt before the commissioners, as evidence of the set-off, — Lord Ellenborough refused to receive it — saying, that the commissioners could neither be considered as having done a judicial act, nor as having represented the assignees, so as to imply that they assented to the defendant's demand; and that it would only be sufficient evidence against the assignees, if it could be shown, that *they acknowledged* that the proof was (8)

*Of the depositions, &c.*

but not of a third person against a party to the suit.

A party's own deposition not evidence for himself.

(1) *Milward v. Forbes*, 4 Esp. 172.

(2) *Fulconer v. Hanson*, 1 Camp. 171.

(3) *Wilson v. Poulter*, 2 Str. 794.

(4) 3 Atk. 415.

(5) *Deady v. Harrison*, 1 Star. 60.

(6) *Ex parte Campbell*, 2 Rose, 51.

(7) *Ex parte Coles*, Buck, 242.

(8) *Pirie v. Mennett*, 3 Camp. 279.

Of the de-  
positions,  
&c.

Old wit-  
ness al-  
lowed to  
refer to his  
deposi-  
tion.

As to right  
of opposite  
party to  
use the de-  
positions  
upon the  
trial.

No gener-  
al right of  
inspection.  
Must  
come out  
of proper  
custody.

Whether  
the soli-  
citor  
bound to  
produce  
proceed-  
ings.

just. There seems, indeed, an insuperable difficulty as to the admission of such evidence, according to the principles which regulate proceedings at law, — where a man is not permitted to substantiate a demand by his own oath.

An old witness has been allowed to refer to his deposition (made some years before) as to the proof of an act of bankruptcy, in order to refresh his memory, and thereby ascertain the date of it. (1)

Those depositions only, which are read in support of the party's case upon the trial, are to be considered as given in evidence; and the opposite party has no right to inspect any other deposition, for the purpose of cross-examining a witness; but he may afterwards call for the deposition of the witness, and read it in evidence for the purpose of contradicting him. (2) So, as we have already seen, upon a bill filed by the assignees for a discovery, the defendants will not be permitted to look into their depositions, in order to prepare their answer. (3) The proceedings are, in fact, kept for the benefit of the creditors, and there is no general right given to inspect them as public documents. Before they are received in evidence, it must be shewn, that they came out of the proper custody, namely, that of the solicitor to the commission; otherwise, the hand-writing of one of the commissioners who took them must be proved. (4)

It is a point frequently made at *Nisi Prius*, whether the solicitor to the commission is bound to produce the proceedings, when served with a *subpoena duces tecum*. Lord Kenyon is reported in one case to have said, that he was not only not bound to produce them, but that it would be criminal for him to do so (5); and Lord Chief Justice Abbott, in another case, held, that the solicitor was not bound to produce them in a collateral action, to which neither the assignees nor the bankrupt were parties —

(1) *Vaughan v. Martin*, 1 Esp. 440.

(2) *Black v. Thorne*, 4 Camp. 191. *Stefford v. Clarke*, 1 Carring. 25.

(3) *Boden v. Dallow*, 1 Atk. 290. ante, 728.

(4) *Collinson v. Hillier*, 3 Camp. 30.

(5) *Bateman v. Hartink*, 4 Esp. 25.

and where the production might tend to the detriment of the assignees. (1) Mr. Justice Holroyd, however, has ruled, that where the party requiring the production of them (though in a collateral action) had an interest in the commission, the solicitor was bound to produce them. (2) And in a recent case Lord Gifford held, that the solicitor was bound to produce the books of the bankrupt, in order that entries relating to the matter in issue, but to no other matter, might be read — though there was in fact a possibility of the assignees being prejudiced by the result (3) of the verdict. But a court of law has no jurisdiction to order books or papers to be delivered to the assignees, at the instance of the defendants — the Lord Chancellor being the proper authority to which such an application should be made; the Court, however, might give the defendant time to plead, until (4) the plaintiff thought proper to produce them.

*Of the de-  
positions,  
&c.*

The Lord Chancellor may, indeed, order the production of the proceedings upon any occasion which he shall think proper. Thus, notwithstanding a commission had been superseded, the proceedings under it were ordered, upon petition, to be produced at the hearing of a cause in the Court of Chancery in Ireland, with a view to the bankrupt's examination being given in evidence; but such an order will not be granted as a matter of course. (5)

*Lord  
Chan-  
cellor  
may  
always  
order the  
produc-  
tion of  
them.*

## SECTION VI.

### *Of the Competency of the Bankrupt and his Wife as Witnesses. (6)*

The bankrupt is not a competent witness in an action by his assignees, to prove either property in himself, or a

*Bankrupt  
not com-  
petent to*

(1) *Laing v. Barclay*, 3 Star. 38.

(4) *Wilson v. Legge*, 7 Moore,

(2) *Cohen v. Templar*, 2 Star. 409.

260.

(5) *Ex parte Bernal*, 11 Ves.

(5) *Hawkins v. Howard*, 1 Ryan 557.

& M. 64.

(6) And see ante, 763. 770.

**Competency of bankrupt.**

increase the fund.

How his competency may be restored.

In an action to recover money lost at play.

debt due to himself, or in any other manner to increase the fund; for the amount of his allowance under the commission depending upon the clear amount of his estate received by the assignees, that right of allowance — together with his right to the surplus if all his creditors are paid in full — give him a direct and immediate interest in the result of the action. (1)

He may, however, be rendered a competent witness, by releasing his right to the allowance and the surplus, and obtaining his certificate (2); but he must have obtained his certificate, before the release can operate to make him competent; for the prospect of obtaining it by increasing the fund, is such an interest as will still render him (3) incompetent. And, where an action was brought by the obligee of a joint and several bond against one of the obligors, who was a surety for the bankrupt, — it was held, that the bankrupt (not having obtained his certificate) could not be called for the defendant, as he would be liable to be sued by the defendant (his surety), in case of a verdict against him. (4) But in a suit in which the king is a party, it has been held, that a release to the bankrupt will not restore his competency, by reason that the crown is not bound by the bankrupt law. (5) This reason, however, appears to be very unsatisfactory; for the rules of evidence depend upon the principles of justice and common sense, and do not seem to appertain in any manner exclusively to the bankrupt law. In an action on the 9 Ann. c. 14. by the assignee to recover money lost by the bankrupt at play, the bankrupt (who had obtained his certificate) was called as a witness to prove the loss, and his competency was held to be restored by three different releases; first, by the bankrupt himself to the assignee; secondly, by all

(1) *Ewens v. Gold*, Bull. N. P.

43. *Butler v. Cooke*, Cowp. 70.

Ex parte *Burt*, 1 Madd. 46.

(2) *Nares v. Sarby*, cit. 2 T. R.

497.

(3) *Masters v. Drayton*, 2 T. R.

496.

(4) *Townend v. Downing*, 14 East.

565.

(5) *Crawford v. Attorney General*.

7 Pri. 2.

the creditors to the bankrupt; and, thirdly, by the assignee (who was not a creditor) to the bankrupt. It was also considered, that a year after the commission issued, it might be presumed that all the creditors had proved — and that a (release signed by all those who had proved) might, therefore, be considered as a release by all the creditors. (1)

Compe-  
tency of  
bankrupt.

But no release, even after the bankrupt has obtained his certificate, will render him a competent witness to *support the commission* (2); for if the commission is not good, the certificate and all the proceedings are void, and the bankrupt would be then liable again to his debts, from which the certificate if valid would discharge him. Therefore, he is not a competent witness to prove his own act of bankruptcy, or even to explain an equivocal act, or to prove the petitioning creditor's debt. (3) For the same reason, he cannot be questioned as to any act of bankruptcy, committed by him prior to that on which the commission is founded. (4) And the general rule, as to his incompetency to support or defeat the commission, applies as well to his cross-examination, as to his examination in chief. (5)

Not com-  
petent to  
support  
the com-  
mission.

Even on  
cross-ex-  
amination.

(1) *Carter v. Abbott*, 1 B. & C. 144.

(2) *Field v. Curtis*, 2 Str. 829.

(3) *Chapman v. Gardner*, 2 H. B. 279. *Cross v. Fox*, *ibid.* n. *Flower v. Herbert*, *ibid.* *Hoffman v. Pitt*, 5 Esp. 22. *Rabitt v. Gurney*, Mont. 482. note. There are two cases, in which a contrary doctrine has been held to some of the positions in the text. In *Russell v. Russell*, 1 Bro. 269. the bankrupt's evidence was received when he had obtained his certificate and received his allowance, on the ground, that he was not bound to refund his allowance. And in *Orlade v. Perchard*, 1 Esp. 286. the bankrupt was permitted to explain a doubtful act of bankruptcy. But the last case has been over-ruled by *Hoffman v. Pitt*, and *Chapman v. Gardner*; and the former ap-

pears to have been decided, without considering the interest of the bankrupt in the *surplus*, or his *contingent liability* in case the commission was superseded.

(4) *Wyatt v. Wilkinson*, 5 Esp. 187. *Binn v. Tetby*, 1 M'Clell. & G. 397.

(5) *Elsom v. Brailey*, 1 Selw. N. P. 239. It is stated in the second volume of Mr. Christian's work on the bankrupt law, that if the defendant calls the bankrupt as his witness, in a case where he is competent to give evidence, (such as to prove that the defendant was not indebted to the bankrupt) he waves all objection to his general competency, and that the bankrupt may then be cross-examined as to the requisites to support the commission; and for this position he cites the case of "*Assignees of*

[illegible]

1. The first step is to identify the problem or goal.

2. Next, we need to gather relevant information and data.

3. Then, we should analyze the information to understand the underlying causes.

4. After that, we can develop a plan or strategy to address the issue.

5. Finally, we implement the plan and monitor the results to ensure success.

(5) *Brind v. Burn*, 3 Tunt. 185. It does not appear, however, from the report of this last case, who were the parties to the action, what was the nature of it, or what were the facts which the bankrupt was called to prove. It

It is also clearly established, that a bankrupt may be a witness to *diminish* the fund, though he has *not obtained his certificate* — because, in so doing, he speaks most manifestly against his own interest; for he may not only defeat his title to the benefit which the law allows him if the fund is of a certain amount, but he risks the displeasure of all his other creditors. (1) In an action of assumpsit, therefore, for goods sold and delivered to the defendant, it was determined that a witness, though he had been twice bankrupt and had not obtained his certificate, was competent to prove (on the part of the defendant) that the goods had been delivered on the account of the bankrupt, and not on that of the defendant — the direct tendency of such evidence being, to diminish the fund divisible amongst (2) the bankrupt's creditors. There may, however, be cases (as has been justly observed by a learned writer on the law of Scotland (3)), where it may happen to be the bankrupt's interest, with a view to his certificate, to diminish the general divisible fund, by introducing some creditors who will carry him through all his difficulties. But, as this proceeding would be a downright fraud, and one which must be concocted in perjury, there seems to be no reason why the bankrupt should not be as much deterred from giving false evidence by the penalties attached to that offence, as any other witness who has a peculiar interest to serve. And when it appears, moreover, that the bankrupt is attempting to favour any one creditor at the expense of the others, his evidence in such a case (4) will, of course, be received with great suspicion. A certificated bankrupt has accordingly been held to be a competent witness for any

*Competency of bankrupt.*

Bankrupt, though uncertificated, may be called to *diminish* the fund.

was contended that the bankrupt was inadmissible, on the ground, that though the principal debt was barred by the certificate, yet the costs consequential to it were not barred; but the Court determined that the costs followed the debt.

(1) *Langden v. Walker*, cit. Cowp. 70.

(2) *Butler v. Cooke*, Cowp. 70.

(3) See Bell's Com. vol. i. 493. sect. 1126.

(4) And see 1 Phill. on Evid. 65.

*Competency of bankrupt.*

Bankrupt cannot by pleading his certificate, be examined for a co-defendant.

Unless plaintiff enters a *nolle prosequi*.

Bankrupt's wife not competent to support commission.

creditor, whose claim against the bankrupt is barred by the certificate. (1)

Where a bankrupt is one of several defendants in an action, he cannot, by pleading his bankruptcy, be admitted to give evidence for the other defendants, notwithstanding he has obtained his certificate; for in the event of a verdict for the plaintiff, he would be liable for costs. Therefore, in an action against a bankrupt and his partner, the bankrupt was held not competent to prove that the goods were sold to such partner only. (2) Neither will a bankrupt, on proof of his certificate in the progress of the trial, be permitted to take a verdict, for the purpose of qualifying him as a witness for his co-defendants. (3) As where he was sued with his other partners on a promissory note, he could not thus be called as a witness to prove an alteration in the note. (4) But where, upon a plea of bankruptcy by one of several defendants, the plaintiff enters a *nolle prosequi* as to him, the bankrupt is thereby rendered a competent witness for the other defendants. (5)

The wife of the bankrupt is no more competent to support the commission than the bankrupt himself, on the well known principle of law, that a perfect unity of interest subsists between husband and wife. And the power, which is given to the *commissioners* by the 37th section of the new act, to examine the wife as to the discovery of the bankrupt's property, is limited to that express purpose, and to the commissioners alone, and does not extend to render her a competent witness for any other purposes, or before any other tribunal. (6)

But in an action of trover by assignees against bankers to recover a promissory note, alleged to have been paid by

(1) *Moody v. King*, 2 B. & C. 558.

(2) *Raven v. Dunning*, 3 Esp. 25.

(3) *Emmet v. Butler*, 7 Taunt. 599. 1 Moore, 322.

(4) *Currie v. Child*, 3 Camp. 283.

(5) *Moody v. King*, *supra*; and see 1 Phill. on Evid. 65. 77.

(6) And see 2 Phill. Ev. 284.



the bankrupt in contemplation of bankruptcy, and on which they claimed a lien, — Lord Kenyon admitted the evidence of the bankrupt's wife, who was called to prove, that it was paid to the bankers in contemplation of bankruptcy — thinking that she was an indifferent witness between the parties; inasmuch as if the assignees recovered, the defendants would be then creditors against the bankrupt's estate to the amount of the note. (1) But it seems doubtful whether this decision could, upon strict principle, be supported; for if the assignees succeeded in the action, the general fund would be augmented by the amount of the note; and though the bankers might prove it under the commission, yet, if the bankrupt's estate did not pay 20s. in the pound, the divisible fund would be finally increased by the difference between the amount of the note, and the amount of the dividends which the bankers would receive upon their proof.

*Compe-  
tency of  
bankrupt.*

The *declarations* of the bankrupt *made before his bankruptcy*, as to the existence of the petitioning creditor's debt, we have seen (2), are receivable in evidence as an admission of the debt; for the bankrupt then had no interest to make such admission; therefore the same objections do not apply to this evidence, as to that given *after his bankruptcy* in support of the commission. Accordingly the bankrupt may allow his attorney (employed by him *before his bankruptcy*) to give in evidence privileged communications *then made*, though offered in proof of the act of bankruptcy. (3) But, in an action brought *by the bankrupt* against an assignee to try the validity of the commission, any admission of the bankrupt, though made *after* the bankruptcy, would be evidence against the bankrupt himself. So the bankrupt's declarations at the time of his departing from his dwelling-house, or absenting himself,

*As to bank-  
rupt's de-  
clarations  
and letters  
before his  
bank-  
ruptcy.*

(1) *Jourdain v. Lefevre*, 1 Esp. 66.

(3) *Merle v. More*, 1 Ry. & M. 390.

(2) Ante, 763.

*Compe-  
tency of  
bankrupt.*

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are (as we have seen (1)) properly received in evidence, as shewing the nature of his absence; though, in strictness, the declaration should accompany the act — or, at least, if not precisely contemporaneous, it should be so connected with it, that the declaration may be properly considered as the result and consequence of the co-existing motives. (2) Thus any letter of the bankrupt written previous to his bankruptcy, and nearly contemporaneous with the act done by him, is admissible in evidence to explain the motives of the act. And in a very recent case at *Nisi Prius* (which was an action brought by assignees to recover back money paid to a defendant on the ground of a fraudulent preference), — Lord Chief Justice Best acted up to the full extent of this principle, by admitting a letter of the bankrupt in evidence (though written five months before the commission issued) explaining the embarrassed state of his affairs — in order to shew that, when the bankrupt made the particular payment in question to the defendant, he had his bankruptcy then in contemplation. (3) The general rule, however, and the most correct one, appears to be, that the declarations of a bankrupt ought not to be admitted to explain any *past* transaction, which at the time of making the declaration was completely finished. (4) For to admit such declarations would be, in effect, to receive (as Mr. Phillipps justly observes (5)) an admission by the bankrupt, that he had committed an act of bankruptcy — a fact, which the bankrupt himself would not be allowed to prove; and yet it would be much less dangerous to hear the bankrupt's own account upon his oath, than his bare relation to third persons at second hand.

(1) Ante, 770.

(2) 2 Phill. Ev. 287.

(3) *Bacon v. Maine*, cor. Best

C. J. Sittings Guildhall after Trin. T. 1826.

(4) *Robson v. Kemp*, 4 Esp. 233.

(5) Vol. ii. 287.

## SECTION VII.

*Of the Competency of Creditors.*

A creditor of the bankrupt is not a competent witness to increase the fund, out of which he may receive a dividend. He cannot, therefore, give any evidence to deprive the bankrupt of his allowance. (1) It was, indeed, held in one case, that a creditor (who had *not proved* his debt) was competent to support the commission, though not to increase the estate — on the ground, that he had no immediate or certain benefit, and that it might be as advantageous for the creditor to be allowed to sue his debtor, as to receive a dividend under the commission. (2) But, as a commission of bankruptcy passes the whole of the bankrupt's estate to the assignees, and appropriates immediately to the satisfaction of his debts what could only be reached remotely and partially by the process of common law, it is, in this respect, a proceeding evidently favourable to the creditors; and therefore in a later case, a creditor (though he had *not proved*) was not allowed to give evidence in support of the commission, under which he *might* afterwards prove and receive a dividend. (3) For it is not enough, that the creditor has not availed himself of the commission — it ought to be certain that he never will — in order to render him competent. (4) And Lord Ellenborough, who had formerly been of a different opinion (5), held afterwards, that a creditor, though he had not proved, was yet incompetent to prove an act of bankruptcy (6); for that the commission

Not competent to support the commission, or increase the fund.

(1) *Shuttlewarth v. Bravo*, 1 Str. 507. *Eggleham v. Haines*, 2 Vin. 11.

(2) *Williams v. Stevens*, 2 Camp. 301.; and see *Rex v. Bullock*, 1 Taunt. 71., where the Court considered, that the commissioners might receive evidence from a creditor who had not proved.

(5) *Adams v. Malkin*, 3 Camp. 545.

(4) Per Lord Eldon, 1 Rose, 392. (note); 2 V. & B. 177.

(5) 2 Camp. 301.

(6) *Crooke v. Edwards*, 2 Star. 302.

Compe-  
tency of  
creditors.

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Compe-  
tent to  
defeat the  
commis-  
sion.

But a cre-  
ditor who  
has sold  
his debt  
is com-  
petent.

Compe-  
tent to a  
certain  
extent in  
commis-  
sion  
against  
members  
of parlia-  
ment.

brought a divisible fund within his reach, and by supporting the commission, the creditor was enlarging his means of satisfaction.

But a creditor, it has been ruled, is a competent witness to overthrow the petitioning creditor's debt. (1)

And a creditor who has sold his debt, or agreed to sell it, is competent to give evidence either in support of the commission, or to increase the fund. For, in this case, the interest which he once had in enlarging the funds no longer exists; and though a debt cannot strictly be assigned at law, yet the assignment will be valid in a court of equity; and after such assignment the creditor is considered merely a trustee for the purchaser, and as ceasing to have any interest in the debt. (2)

In one species of bankruptcy, namely, that committed by members of parliament (3), the act of bankruptcy must necessarily be proved to a certain extent by a creditor; for the party is adjudged by the statute to be a bankrupt, unless within one month after personal service of the summons he shall pay, secure, or compound for his debt to the satisfaction of his creditor, or enter into a bond prescribed by the statute; and the creditor is in ordinary cases, of course, the *only person* who can prove, that the debt has not been paid, secured, or compounded for to his satisfaction. With reference to these negative circumstances, the evidence of a creditor must (as to this particular act of bankruptcy) be admitted to that extent. But the necessity which exacts this admission, also limits the extent of it; for although he must be admitted to prove what he alone can prove, yet he is not to be allowed to prove what can be established by the evidence of others. The circumstance, therefore, of a bankrupt *being* a member of parliament, and a banker, may be derived from other sources,

(1) In *re Codd*, 2 Sch. & Lef. 116. This, however, must be taken with some qualification, for it may be the interest of an execution or a mortgage creditor to upset the

commission, in order to confirm his own security.

(2) *Granger v. Furlong*, 2 Bl. 1275. *Heath v. Hall*, 4 Trunt. 326.

(3) See ante, 85.

pend upon the statement of *Compe-  
tency of  
creditors.*

is not a competent witness at  
mission regularly sued out, be-  
ond to the Lord Chancellor con-  
he several facts, upon which the  
sion depends (2); but his deposition  
missioners, we have seen, is ad-  
ases as proof of his debt, though he  
called to support it. It has, however,  
*Prius*, that he may be called to *defeat* the  
or even to cut down his own debt. (4) *aliter to  
defeat the  
commis-  
sion.*

It is seen (5), that the declarations and ad-  
petitioning creditor have been received in  
the purpose of showing the insufficiency of the  
debt, in one instance (6), the admission was  
made after the issuing of the commission. But, in  
the incompetency of the petitioning creditor may  
be shown, by releasing his debt to the assignees — though  
the bankrupt is brought by the bankrupt to dispute the com-  
mission; and a release to the assignees alone is sufficient  
purpose, without a release to the bankrupt.

A party ordered to attend as a witness, though he allege  
that he is a creditor, and therefore incompetent, ought  
nevertheless not to absent himself on this ground; for the  
result of his examination may establish that he is not a  
creditor. (8) *A party  
alleging  
himself a  
creditor  
should ne-  
vertheless  
attend.*

A commissioner has been permitted to be examined as  
a witness in support of the commission, on the ground, that  
he could not be compelled to refund the fees which he had  
received. (9) He has still, however, an interest in the  
*Commis-  
sioner  
compe-  
tent.*

- 1) Per Lord Eldon, *Ex parte Harmer v. Davis*, 2 Rose, 203. 38.; but see *Harmer v. Davis*, 1 Moore, 300.
- 2) *Green v. Jones*, 2 Camp. 411. (7) *Koopes v. Chapman, Peake*, 19.
- 3) *Ibid.*
- 4) *Lloyd v. Stretton*, 1 Star. 40. (8) *In re Gooldie*, 2 Rose, 330.
- 5) *Ante*, 765. (9) *Crooke v. Edwards*, 2 Star. 302.
- 6) *Dowden v. Fowle*, 4 Camp.

**Compe-  
tency of  
creditors.**

———  
**So an as-  
signee re-  
leasing his  
debt.**

future fees which he might get, if the commission were supported, *valeat quantum*.

An assignee, who has released his individual claims on the estate, is an admissible witness to prove the petitioning creditor's debt; for he is then a mere trustee, whose trust is coupled with no personal interest. (1)

(1) *Tomlinson v. Wilkes*, 2 Brod. & B. 597. 5 Moore, 173.

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## CHAP. XX.

## OF SUPERSEDING A COMMISSION.

SECT. 1. *Of Applications for a Supersedeas by the Bankrupt.*

2. *Of the like by other Persons.*

3. *Of the Practice upon Petitions for a Supersedeas.*

4. *Of the Effect of the Supersedeas.*

5. *Of the Writ of Procedendo.*

For the *Costs* relating to the *Supersedeas*, see post, Chapter on "*Costs*."

And see also, "*Joint Commissions*," ante, 128.

## SECTION I.

*Of Applications for a Supersedeas by the Bankrupt.*

WHEN a commission of bankrupt is improperly issued, or fraudulently obtained, or ought no longer to be proceeded in, the Lord Chancellor will, on the petition of the bankrupt or any other party concerned, accompanied by a proper statement of the facts on affidavit, order the commission to be superseded. But a bankrupt will not be permitted to try the validity of his commission, by actions against his debtors. (1) The writ of *supersedeas* issues under the Great Seal by the order of the Lord Chancellor; and the usual course pursued when the bankruptcy is disputed is, to order a feigned issue to try the bankruptcy at law (2)—unless, indeed, the commission appears plainly to have been taken out fraudulently and vexatiously, in which case it will at once be superseded. (3)

When a commission will be superseded.

(1) *Lowndes v. Cornford*, 1 Rose, 180. 18 Ves. 299. *Harlow v. Crowley* in Exchequer, Buck, 273. contra.

(2) *Ex parte Wilson*. *Ex parte Bradshaw*, 1 Atk. 217.

(3) *Ex parte Smith*, 1 Rose, 147. *Ex parte Emery*, 2 Rose, 254.; and see ante, 134.

*Applications by bankrupt.*

Power of superseding discretionary in the Chancellor.

The power of superseding a commission appears to be entirely discretionary in the Lord Chancellor, except in one instance provided for by the new statute (1) — namely, where nine tenths in number and value of the creditors agree to accept a composition from the bankrupt in satisfaction of their debts — in which case the Lord Chancellor is expressly *directed* to supersede the commission. (2) But, in all other cases, the same authority which enables him to issue a commission, gives him a discretionary power to recall it — possessing in this instance the same control over a commission of bankrupt, as other courts are used to exercise over their own writs and process; and, indeed, he generally does act in analogy to the proceedings of the other courts in this respect. (3)

Commission may be superseded, though strictly unimpeachable.

In some cases, where the justice of the case requires it, the Lord Chancellor will supersede a commission, though it may be unimpeachable on strictly legal grounds. (4) And, although the requisites to sustain a commission may appear on the proceedings to be established, yet if the Court be satisfied on affidavit of their insufficiency, it will supersede the commission without an issue. (5)

Grounds for the application.

There are various causes for superseding a commission, for which the party against whom it is issued, or indeed any other party concerned, may *ex debito justitiæ* apply by petition to the Chancellor. It is proposed, however, in the first place to consider those cases where the bankrupt is entitled to apply for a *supersedeas*.

Delay in prosecuting commission.

In the first place, if the commission is not opened until a long period after it issues, — that has been always held a

(1) Sections 133, 134.

(2) There was also only one case specified in the former statutes, in which the Lord Chancellor was *positively directed* to supersede a commission — and that was, where the petitioning creditor had *privately* compounded with the bankrupt, (5 G. 2. c. 30. s. 24.; and see *Ex parte Paston*, 15 Ves. 461. *Ex parte Freeman*, 1 Rose,

380.) but the new statute (section 5) omits the word "*privately*," and gives the Chancellor a *discretionary* power in this respect.

(3) *Ex parte Freeman*, 1 Rose, 380.

(4) *Ex parte Dufrene*, 1 Rose, 553. 1 Ves. & B. 51.

(5) *Ex parte Gallimore*, 2 Rose, 234.



good ground for superseding it. (1) And by a general order of Lord Loughborough (2), if a town commission is not prosecuted by the expiration of fourteen days after its date, or a country commission at the end of twenty-eight days, each is liable to be superseded; but one day further must elapse in both cases, before the order for the *superseas* can issue. A commission, supersedable under this order for want of prosecution, cannot be superseded by the *bankrupt* without a petition. (3)

*Grounds for the application.*  
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If the bankrupt is an *infant* (4) when the commission issues, or if all the trading took place during infancy (5), he may apply to have it superseded. So, if it be taken out against a *feme covert*, it is supersedable, though upon a trading prior to her marriage. (6) But when it appeared, that the bankrupt had held himself forth to the world as an adult and *sui juris*, and had traded in that character for two years, contracting debts to a considerable amount, — Lord Eldon dismissed his petition to supersede the commission, and left him to his action at law (7); and the same rule will apply to a *feme covert* living apart from her husband, and holding herself out to the world as a *feme sole*. (8)

Bankrupt being an *infant*; a *feme covert*;

A commission will also be superseded, if the bankrupt is *not a trader* when the commission issues. And he is not precluded from applying to supersede the commission on this ground, though he has even obtained his certificate under it — if, upon the trial of an action by the assignees against a creditor, their title is thus successfully resisted, and the commission becomes inoperative. (9) Neither will he be precluded from such an application, by having stated in a petition to enlarge the time for his surrender, that he has been *duly declared a bankrupt*. (10) But when an appli-

not a trader. When not estopped from applying to supersede.

(1) Ex parte *Puleston*, 2 P. Wms. 45. Ex parte *Fletcher*, 1 Rose, 154.

(2) 26th June 1793. For the construction of this order, see ante, 120.

(3) Ex parte *Gale*, 1 G. & J. 43.

(4) Ex parte *Barwis*, 6 Ves. 601. Ex parte *Sydebotham*, 1 Atk. 146.

(5) Ex parte *Moule*, 14 Ves. 603.

(6) Ex parte *Mear*, 2 Bro. 265.

(7) Ex parte *Watson*, 16 Ves. 265.

(8) Ibid.

(9) Ex parte *Bass*, 4 Mad. 270.

(10) Ex parte *Jones*, 11 Ves. 409.

*Applications by bankrupt.*

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Insufficient act of bankruptcy;  
when only a ground for suspending the advertisement.

cation of this nature is delayed by the bankrupt for a considerable time, when it might have been made earlier, the petition will in that case be dismissed. (1)

A commission will also be superseded, if the bankrupt when it issued had *not committed an act of bankruptcy* (2); or if he had not committed one within a long period before the issuing of it. (3) But when the bankrupt applies to supersede the commission on *this ground alone*, the Court will only suspend the insertion of the advertisement declaring the bankruptcy in the Gazette, and will receive an affidavit of *other* acts of bankruptcy; for, upon a trial at law, the commission may be supported upon the proof of any other act, though different from that in the adjudication. If the additional affidavit, however, is not satisfactory, the commission will then be superseded with costs. (4) But on a petition for a *supersedeas* before adjudication, the Lord Chancellor will not stop the commissioners from proceeding to inquire, whether the party has become bankrupt or not — merely on *his own* allegation, that he has not committed an act of bankruptcy, or is not indebted to the petitioning creditor to the (5) amount of 100*l.*; — but if, in addition to either of these circumstances, the bankrupt swears that he is solvent, and offers to bring the petitioning creditor's debt into Court, the Chancellor will then restrain the publication of the bankruptcy in the Gazette. (6)

Preference of petitioning creditor.

So, if the petitioning creditor receives his debt, or more in the pound than the other creditors, it has been held that the commission may be superseded (7); though it has been subsequently decided, that where the petitioning creditor after the act of bankruptcy (but *before the commission* issued) received a sum of money from the bankrupt, which

(1) *Ex parte Moule*, supra. *Ex parte Kirk*, 15 Ves. 464. *Flower v. Herbert*, 2 Ves. 326. *Ex parte Abell*, 1 G. & J. 199.

(2) *Ex parte Foster*, 1 Rose, 49. *Ex parte Proston*, ibid. 259.

(3) *Ex parte Bowes*, 4 Ves. 168.

(4) *Ex parte Burgess*, Buck, 233.

(5) *Ex parte Stokes*, 7 Ves. 405. *Ex parte Lingood*, 1 Atk. 246. *Ex parte Hague*, 1 Rose, 150.

(6) *Ex parte Fletcher*, 1 Rose, 336.

(7) *Sed quære*, whether the bankrupt himself can for this cause petition to supersede the commission. See *Ex parte Kirk*, infra.

reduced the debt below 100*l.*, — *that* was not a sufficient ground for superseding the commission; for that the payment could not be retained by him against the assignees, and the suing out the commission amounted of itself to a disaffirmance of the payment. (1) And payment of money by the bankrupt to the petitioning creditor *after the suing out* of the commission, though it may render the commission supersedable, does not render it *ipso facto* void. (2) It has been decided, also, that the *bankrupt himself* cannot supersede the commission, on the ground of having given the petitioning creditor a security for his debt in preference to the other creditors. (3)

*Grounds  
for the ap-  
plication.*

The commission will also be superseded, if the *petitioning creditor* is an *infant* when it issues; for as he is obliged to enter into a bond to the Lord Chancellor upon striking the docket, he cannot, as an infant, bind himself by bond. (4) And where there are several petitioning creditors — each being required to give a bond — this objection will equally apply. (5) So, if the petitioning creditor has not a *legal debt* to the amount specified in the (6) statute — or if the debt accrued *subsequent* to *any* act of bankruptcy committed by the (7) bankrupt — or is barred by the statute of limitations (8) — or if the petitioning creditor had the bankrupt in execution at the time of issuing the commission (9), — the bankrupt, in each of these cases, may apply to supersede it. But a mere formal defect in the affidavit of the petitioning creditor is not a sufficient ground for superseding the commission — as where the affidavit was

*Petition-  
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tor being  
an infant.*

*Insuffici-  
ency of his  
debt.*

*Having  
bankrupt  
in execu-  
tion.*

(1) *Ex parte Miller*, Buck, 283.

(2) *Garrett v. Biddulph*, 4 Esp. 104.

(3) *Ex parte Kirk*, 15 Ves. 464. This case was decided with reference to the 5 G. 2. c. 30. s. 24.; but see now 6 G. 4. c. 16. s. 8., by which the Lord Chancellor has a discretionary power in such a case, either to supersede the commission, or to order it to be proceeded in.

(4) *Ex parte Barrow*, 3 Ves. 554. *Ex parte Morton*, Buck, 42.

(5) *Ibid.*

(6) *Ex parte Hylliard*, 1 Atk. 146. *Burnaby's case*, 1 Str. 653. *Medlicott's case*, 2 Str. 899. *Ex parte Mackerness*, 1 P. Wms. 259.

(7) Section 19.

(8) *Quantock v. England*, 2 Bl. 702. *Horseley's case*, Mosely's Rep. 57. *Ex parte Dewdney*, 15 Ves. 493. *Ex parte Roffey*, 2 Rose, 245.

(9) *Burnaby's case*, supra. *Cohen v. Cunningham*, 8 T. R. 125.

*Applications by bankrupt.*  
—

for goods sold and delivered, when (at the time of making it) he had previously entered up judgment in an action brought for the goods; for it is sufficient, if the creditor swears to the truth and reality of the debt. (1) And whenever the petitioning creditor's debt is found insufficient to support the commission, the Lord Chancellor is now empowered by the 18th section of the new statute, upon the application of any other creditor who has proved a debt sufficient to support a commission, (provided the same has been incurred not anterior to the petitioning creditor's debt), to order the commission to be proceeded in, notwithstanding the insufficiency of the petitioning creditor's debt.

Commission fraudulently or vexatiously issued.

When a commission is *fraudulently* or *vexatiously* issued (2), it will in every such case be superseded; and the Court will in addition punish the parties concerned, by committing them to prison, and ordering them to pay the costs. (3) And where there is nothing done under a commission, and the petitioning creditor is not to be found, — this is held to be such a case of fraud, as will render the commission (4) supersedable. So also, though the commission be legally valid, yet if it has been taken out against good faith, or with a view to enforce a compliance with an arrangement then pending between the parties, — the Lord Chancellor will supersede it, upon the general principle which all courts adopt to control the abuse of their own process. (5) In a recent case it was held by the late Vice-Chancellor, that if the fraudulent purpose could be defeated without superseding the commission, and there was no objection to it on any other ground, the Court would not then interfere by granting (6) a *superseas*; but Lord Eldon, upon appeal, in a luminous judgment, reversed this order, saying, that when a commission is so taken out, the Court will determine at once that it shall not stand. (7)

(1) In re *Bryant*, 1 Rose, 288. 1 V. & B. 211.

(2) Ex parte *Wilson*, 1 Atk. 218. Ex parte *Conway*, 15 Ves. 62. Ex parte *Haywood*, *ibid.* 67. Ex parte *Arrowsmith*, 14 Ves. 209.

(3) Ex parte *Thorpe*, 1 Ves. 394.

(4) Ex parte *Hartop*, 9 Ves. 109. 12 Ves. 349.

(5) Ex parte *Harcourt*, 2 Rose, 203.

(6) Ex parte *Bourne*, 1 G. & J. 311.

(7) 2 G & J. 137.

If a commission is taken out for an express purpose, *foreign from its proper object* — such as to determine a lease (1) — or to work a dissolution of partnership (2) — or to put an end to an action at law commenced by the bankrupt (3) — it will be superseded at the costs of those who take it out. And the same, where the object of issuing it is even meritorious — as when it is taken out for the purpose of facilitating a composition with the creditors; for, though in many instances the result might be beneficial, yet as such a practice (Lord Eldon said) might lead to much mischief, the Court would always discountenance it. (4) It is no ground, however, for superseding a commission, that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt. (5) And though the petitioning creditor may have really *other objects* in view than the mere distribution of the estate — as thinking it a prudent thing to get rid of a bad partner, — the Court has refused on *that account alone* to supersede the commission, where it plainly appeared that he was not influenced by any fraudulent motives. (6)

*Grounds for the application.*

Commission issued for a different purpose from its proper object.

A *country commission* will also be superseded, which does not include the names of two barristers, according to the terms of Lord Loughborough's order (7) — or when the order is evaded, by carrying the commission to be executed at a distant town, when it might with as much propriety be executed at another town, near which two barristers reside. (8) But when a barrister does not reside so near, as to be able to attend without his travelling expences being paid, that is an excuse for dispensing with the order. (9) And in one instance a country commission was refused to be superseded, where

Country commission not having names of two barristers inserted.

(1) *Ex parte Gallimore*, 2 Rose, 424.

(2) *Ex parte Browne*, 1 Rose, 151.

(3) *In re Bourne*, cor. Lord Chancellor, Sittings after Trinity Term, 1826.

(4) *Ex parte Bourne*, 16 Ves. 150.

(5) *Menham v. Edmonson*, 1 Bos.

& P. 369. *Ex parte Bowes*, 11 Ves. 541.

*Ex parte Arrowsmith*, 14 Ves. 209. *Ex parte Gardner*, 1 Rose, 377. 1 Ves. & B. 45.

(6) *Ex parte Wilbean*, Buck, 459. 5 Mad. 1.

(7) 12th August 1800.

(8) *Ex parte Harbin*, 1 Rose, 58.

(9) *Ibid.*

*Applications by bankrupt.*  
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Any commissioner being a creditor.

Want of prosecution.

Two commissions pending.

the ground of the application was, that it was issued to a place where there were only two creditors, and which was distant 200 miles from the great body of the creditors ; — though the Court, in this case, thought it was but just to enlarge the time for the choice of assignees. (1) A country commission will likewise be superseded at the costs of the petitioning creditor, when the name of any commissioner is inserted, who is a creditor of the bankrupt, — and this even on an *ex parte* application. (2) If notice of the adjudication, also, is not given at the bankrupt office at some period of the twenty-ninth day after the issuing of a country commission, the practice is uniform to supersede it as a matter of course on the thirtieth day, upon an application made for that purpose on the twenty-ninth. In one case, even where the adjudication did not take place until the twenty-eighth day — and, by the course of the post from the place where the commission was executed, it was impossible that such notice could reach London by the twenty-ninth, — the Lord Chancellor refused to supersede a second commission, which had been taken out under these circumstances by another creditor. (3)

*Two commissions cannot subsist together for the same purpose* — the *second* is (strictly speaking) void (4), and will in general be superseded. But special circumstances, as *fraud* or *laches* in the petitioning creditor under the first commission — or an acquiescence of the other creditors for a considerable time after the issuing of the second commission, — will be a ground for supporting the last commission, and for *superseding the first*. (5) And the Chancellor will always exercise a discretion on the subject, and support that commission which is most convenient, by superseding the other. (6)

(1) *Ex parte Fellows*, 2 Mad. 141.

(2) *Ex parte Story*, Buck, 70. *Ex parte Mathews*, 1 G. & J. 164.; and see Lord Eldon's General Order, July 25th, 1817, and *Ex parte Prosser*, 2 Rose, 370. *Ex parte Crundwell*, 2 Mad. 292.

(3) *Ex parte Henderson*, 2 Rose, 190.; but see *Ex parte Soppit*, Buck, 81.

(4) *Ex parte Buller*, 1 Rose, 136.; and see ante, Chapter V. Section 4.

(5) *Ex parte Brown*, 2 Ves. jun. 67. *Ex parte Proudfoot*, 1 Atk. 253.

(6) *Ex parte Layton*, 6 Ves. 434. *Ex parte Hardwicke*, *ibid.* *Ex parte Lees*, 16 Ves. 472. *Ex parte Moor*, 19 Ves. 539.

Thus, where a period of fifteen years had elapsed since a first commission issued, during which the bankrupt was permitted to carry on trade, — a petition to supersede the second commission by the petitioning creditor under the first (who was the bankrupt's father-in-law, and must have had some knowledge of the bankrupt's transactions during all that period) was dismissed with costs, — Lord Eldon saying, that if the first commission had been kept on foot fifteen years, with the view of protecting the bankrupt, and enabling him to defraud all those with whom he might deal in subsequent transactions, he would rather supersede *that* commission, at the instance of the assignees under the *second*, than the *second* at the instance of the assignees under the *first*. (1) So, where the petitioning creditor was prevented from prosecuting a *first* commission by the artifices of a person, who was desirous of covering certain transactions between himself and the bankrupt, by the lapse of two months after it had issued, — the Lord Chancellor directed a writ of *procedendo* to issue for the prosecution of that commission, notwithstanding it had in fact been superseded, and two other commissions subsequently sued out. (2) So, also, where the parties under the *first* commission place themselves by contract in a different situation, from what they were in when the first commission issued, the first will be superseded, and the second supported. (3) And cases have occurred, where, upon a bankrupt under a subsisting old commission applying to supersede a new one, the Lord Chancellor has refused to interpose — if the persons claiming beneficially under the old commission did not mean to interfere with the effects under the new one; though, at the same time, this will not prevent the first commission from being set up as a bar to an action under the second. (4) The bankrupt, however, will be justified in applying to supersede

*Grounds  
for the ap-  
plication.*  
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(1) Ex parte *Lees*, 16 Ves. 472.

(2) Ex parte *Knight*, 2 Rose, 319.

(3) Ex parte *Bullen*, 1 Rose, 136.

(4) Ex parte *Rhodes*, 15 Ves.

543. Ex parte *Crew*, 16 Ves. 236.  
Ex parte *Irvine*, 1 Mad. 74.

*Applications by bankrupt.*  
—

a second commission, where a creditor (who might have proved under the first) is the petitioning creditor under the second — or where it is taken out under circumstances making it not expedient, that it should remain ostensibly in force, whilst void in law. But, if the bankrupt applies to have it superseded, on the principle, that all the property is vested in the assignees under the first commission, — the Lord Chancellor may order him to bring all his property into Court, that the equities between the two classes of creditors may be settled. (1) It is no ground for superseding a joint commission against two partners in this country, that a prior separate commission against one of them is existing in Ireland. (2)

*Third commission.*

Where a *third* commission issues against a bankrupt, who has not paid 15s. in the pound under the second, it would seem now, that the Lord Chancellor would supersede the *third* commission, on the ground that (by the 127<sup>th</sup> section of the new act) all his future property is declared to *vest in the assignees* under the second commission. (3)

*A separate and joint commission pending.*

Another cause for superseding a commission is, as we have before seen, when *separate* and *joint* commissions are issued against the different members of a partnership; — in which case the Lord Chancellor will, for the convenience of administering the *joint effects*, in general, supersede the *separate* commission, and establish the joint one. (4)

*Offer to satisfy creditors.*

The Lord Chancellor has refused to stay the progress of a commission, upon a *mere offer* to pay into the name of the Accountant-General a fund alleged to be sufficient for the payment of the creditors. (5) And where the bankrupt proposed, that a freehold estate (of which he was possessed, and which he alleged was more than adequate to the payment of his debts) should be sold, and the proceeds

(1) *Ex parte Lees*, 16 Ves. 474.

*Ex parte Hodgkinson*, 2 Rose, 175.

(2) *Ex parte Cridland*, 2 Rose, 164. 3 V. & B. 94.

*Ex parte Buckle*, 1 G. & J. 52.

(4) And see ante, 129.

(3) *Ex parte Baker*, 1 Rose, 452.

(5) *Ex parte Kemp*, 2 Rose, note (a).



applied to that purpose, — Lord Eldon thought he could not interfere, without being perfectly satisfied that the proposal would be fully and speedily effectuated. (1)

*Grounds  
for the ap-  
plication.*

But if *all* the creditors (who have proved debts under the commission) agree to have it superseded, the bankrupt may, in this case, petition for a *supersedeas* (2); the consent, however, of the creditors must be certified by the commissioners; and this proceeding will not be dispensed with, though all the creditors have even received 20s. in the pound — and though some of them reside abroad. (3) When, however, two creditors (who had been, as well as all the others, paid their debts in full) could not be found, but their securities had been delivered up with receipts upon them, and their signatures satisfactorily proved, — the Lord Chancellor thought this was ground sufficient for superseding the commission. (4) Any secret preference of a creditor, by the bankrupt giving him money or security to induce him to give his consent, will be considered fraudulent as against the other creditors; therefore, when the bankrupt confessed a judgment to a creditor, in consideration of his not opposing the bankrupt's petition for a *supersedeas*, — the Court of Common Pleas set it aside, even on the application of the bankrupt. (5) By a general order of Lord Eldon (6), no commission can now be superseded on the ground of the consent of all the creditors, until after the second meeting (7); and the commissioners are directed at that meeting to adjourn the choice of assignees, if they are satisfied that such a petition will be presented.

*Consent of  
creditors.*

Under this head of *consent of creditors* may be classed the provision in the new statute, as to what is termed the *composition contract*, which is taken from the Scotch sequestration act, — and which, having been frequently acted upon with

*Composi-  
tion con-  
tract.*

(1) *Ex parte Bryant*, 2 Rose, 5.

(2) *Ex parte Jones*, 8 Ves. 328.

(6) 21st August 1818, *Buck*, 281.

(3) *Ex parte Jackson*, 8 Ves. 535.  
*Ex parte Milner*, 19 Ves. 204.;  
and see 1 Atk. 155. 244.

(7) The practice before was to supersede it at any time after the first meeting. *Ex parte Duckworth*, 16 Ves. 416. *Ex parte Law*, 4 Mad. 273.

(4) *Ex parte King*, 2 Ves. 40.

(5) *Thomas v. Rhodes*, 5 Taunt.

*Applications by bankrupt.*  
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advantage in that country, it has been thought advisable to engraft on the English bankrupt law. By *section 133.* it is provided, that if at any meeting of creditors after the bankrupt shall have passed his last examination (whereof and of the purport whereof twenty-one days notice shall have been given in the Gazette) the bankrupt or his friends shall make an offer of composition, or security for such composition, which *nine-tenths* in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall thereupon be appointed, whereof a similar notice shall be given; and if at such *second* meeting *nine-tenths* in number and value of the creditors then present shall also agree to accept such offer, the Lord Chancellor shall and may, upon such acceptance being testified by them in writing, supersede the commission. By *section 134.*, any creditor, whose debt is below 20*l.*, is not to be reckoned in *number*, but the debt is only to be computed in *value*. Any creditor (to the amount of 50*l.*) residing out of England must be personally served with a copy of the notice of the meeting so long before, as that he may have time to come and vote at it: and he is entitled to vote by letter of attorney, executed and attested in the manner required for creditors voting in the choice of assignees. If any creditor agrees to accept any gratuity, or higher composition, for assenting to such offer on the part of the bankrupt, he is liable to forfeit the debt due to him, together with such gratuity or composition. And the bankrupt must (if required) make oath before the commissioners, that there has been no such transaction between him (or any other person with his privity) and any of the creditors — and that he has not used any undue means or influence with any of them, to obtain their assent to the offer of composition.

General order as to holding the meetings, &c.

As no provision is made in the act with respect to the manner of holding these two meetings, or in which evidence is to be given of the performance of the several particulars contained in the above sections, the following directions have been established, by a general order of Lord Eldon

very recently made. (1) At the first meeting a minute must be taken by the solicitor of the assignees, of the names of the several creditors present, and of the amount of their several debts standing in proof upon the proceedings — distinguishing such of them as shall assent to the above composition. The second meeting is required to be held at a meeting of the commissioners, who are directed, by deposition of witnesses and documentary evidence, as to them shall appear to be proper, to inquire and ascertain whether the requisites of the act previous to such meeting have been duly performed, and to certify the same to the Lord Chancellor, together with the proceedings which have taken place at such second meeting. For the better information, also, of all parties interested, the commissioners are ordered to state in their certificate, what proportion in number and value the creditors assenting to the composition bear to the creditors who have proved debts to the amount of 20*l.* and upwards, and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.

*Grounds  
for the ap-  
plication.*

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When questions on this new enactment of the composition contract may come before our courts for decision, they will, probably, be guided in some measure by the determinations of the Scotch tribunals, which have already taken frequent cognizance of its different provisions. These are all collected in Mr. Bell's Commentaries on the Laws of Scotland (2), but though useful to refer to in a case of difficulty, cannot be given as a precise authority to the English lawyer. It seems that the Scotch courts hold, that an offer to the creditors of a sum in gross (or what they quaintly term a *slump sum*) is not a composition within the meaning of the above provision—deeming it necessary that each creditor shall be offered a rateable proportion of his debt; but after this offer has been made, any additional composition of so much per pound, though payable on a contingency, is allowed to be tacked to it. The security offered by the bankrupt or

Decisions  
of the  
Scotch  
courts  
inde.

(1) 27th June 1826.

(2) Vol. ii. p. 484.

*Applications by bankrupt.*  
—

his friends, they likewise hold, must extend to the whole composition;—and, therefore, a composition of 5s. in the pound, with security only for 4s., and the bankrupt's own bill for the remainder, has been decided to be a bad offer. The creditor's assent to the composition at the first meeting is, also, held not binding upon him at the second; the first meeting being considered (as indeed plainly appears from the above enactment) to be intended only for receiving the proposal of the bankrupt, or his friends — and the second to be the one for finally deciding on it.

Bankrupt cannot apply before surrender.

Except when.

It is a general rule, that the bankrupt cannot petition to supersede the commission before he has surrendered to it; therefore, he cannot apply for a *supersedeas* before any meeting has been held under the commission. (1) And if the time for his surrender has expired, he must first apply by petition for leave to surrender, before he can petition for a *supersedeas*. (2) This rule, however, has been sometimes dispensed with, where there was no intention in the bankrupt to defraud his creditors by not appearing within the time appointed, and when his absence proceeded from ignorance of the consequence, or from accident — or where he was out of the country, and never heard of the issuing of the commission. (3) And, indeed, it was the custom with Lord Macclesfield, when the bankrupt's omission to surrender arose from any of these causes, to supersede the commission on that account alone, in order to prevent a prosecution against him for felony. (4) In one case, too, after the adjudication, Lord Eldon (upon being satisfied that there was not a sufficient act of bankruptcy) superseded the commission at the costs of the petitioning creditor, although the bankrupt had not previously surrendered. (5) And where the application is made by the petitioning creditor — and it appears that the bankrupt was out of the

(1) *Ex parte Stokes*, 7 Ves. 405. *Lavender*, 1 Rose, 55. *Ex parte Jones*, 11 Ves. 409. *Ex Hopkins*, *ibid.* 328.  
*Ex parte Wilkinson*, 1 G. & J. 587. (4) 1 Atk. 222.

(2) *Ex parte Jones*, 8 Ves. 528.

(5) *Ex parte Foster*, 1 Rose, 49;

(3) Per Lord Hardwicke, *Ex parte Wood*, 1 Atk. 222. *Ex parte Proctor*, *ibid.* 259.

country, and had not heard of the commission — and all the creditors (who have proved) subscribe their names to the petition — and the assignees also testify their consent; — it seems, then, a matter of course, to supersede the commission without any surrender of the bankrupt. (1) If the bankrupt dies before the last meeting of the commissioners, and is thus by the act of God prevented from surrendering, the Court will, then, upon the petition of his personal representative, make the same order as if he had surrendered. (2) But where the bankrupt had died abroad *after the third meeting* without surrendering, it was determined, that a petition by his representative to supersede a commission could not be heard, unless it made out a case, that would induce the Court to permit a surrender if the bankrupt were living. (3)

*Grounds  
for the ap-  
plication.*

A bankrupt, who is *attainted* of felony, cannot be heard by petition to supersede the commission, whether his attainder arose out of the commission of bankrupt, or is wholly irrelevant to it (4); for a person *attainted* can be heard only in a court of justice, for the direct purpose of reversing the attainder, and not in the prosecution of a civil right. (5) But a bankrupt, in custody under a commitment

Bankrupt  
attainted  
cannot  
petition.

But com-  
mitment

(1) *Ex parte Hopkins*, 1 Rose, 228.

(2) *Ex parte Whittington*, Buck, 235.

(3) *Ex parte Crowther*, Buck, 480. With respect to the above rule of practice, that a party shall not be allowed to apply to supersede a commission without a previous surrender to the commissioners, it undoubtedly seems rather inconsistent, that he should thus be required, in a certain degree, to submit to the very authority which he insists to be invalid — and the validity of which, also, without any such surrender, it is competent for him to contest (as the law at present stands) either in

a civil action, or a criminal prosecution. See *Ex parte Roberts*, 1 Mod. 72. Sir W. Evans recommends a middle course of proceeding, namely, to give the party an opportunity of submitting the question in each particular case to the consideration of the Court, upon a particular motion; and that the surrender should be dispensed with, whenever the opposition to the commission appears to arise from a fair and real objection to its validity, and not from any vexations or improper motive. See Letter to Romilly, s. xxvi.

(4) *Rex v. Bullock*, 1 Taunt. 82.

(5) *Ibid.* 14 Ves. 452.

*Applications by bankrupt.*

by commissioners does not wholly incapacitate him.

Not precluded by a judge's order.

What no grounds for applying.

As to misnomer.

As to misdescription.

by the commissioners for prevarication, is not thereby *absolutely incapacitated* from petitioning for a supersedeas (1) — especially when all his creditors consent to the commission being superseded (2); though, in one instance of this kind, Lord Eldon refused to supersede the commission, even with the consent of the creditors — considering that the bankrupt, by not answering to the satisfaction of the commissioners, was guilty of a great offence. (3) Where the bankrupt was under terms (by a judge's order) not to proceed in a petition then pending to supersede a commission, Lord Eldon said, that he would not hold a man precluded, by an order of that kind, from applying to the Great Seal on a subject within its peculiar jurisdiction. (4)

It is no ground for the bankrupt's application to supersede a commission, that he is described in it by a different *name*, if that was the name which he had himself adopted and used; for the law will not permit a man to say that he is not known by a name, which he has himself held forth to the world as his (5) right one. And where there is only one commission issued, and the name is *idem sonans*, a variance in the spelling does not seem to be material. (6) Nor will a commission be superseded on account of a misdescription of the bankrupt, if he is well known by the description (7) in the commission; nor where a *fême covert* trader by the custom of London was by mistake described as a *widow*. (8) But where the bankrupts were described as “*of Sun Wharf London and Wolverhampton*” — and it appeared they had no residence or establishment whatever at *Wolverhampton*, — the commission was in this case superseded. (9) But “*L. H. M., of Finsbury Square, in the*

(1) *Ex parte Maginnis*, 1 Rose, 60. 18 Ves. 289.

(2) *Ex parte Browne*, 2 Swanst. 290.

(3) *Ex parte Bean*, 17 Ves. 47. 1 Rose, 211.

(4) *Ex parte Dick*, 1 Rose, 51.

(5) *Ex parte Smith*, 2 Rose, 25.

(6) *Re Baldwin*, 2 Rose, 20.; and see post.

(7) *Ex parte Horsley*, 2 Mad. 11.

(8) *Ex parte Carrington*, 1 Ark.

206.

(9) *Ex parte Beekwith*, 1 G. & J. 20.

*city of London*” — instead of the “*county of Middlesex*,” — is not a material misdescription. (1)

*Grounds  
for the ap-  
plication.*

Although there may be a strong probability, that the person (against whom a commission is taken out) is not a proper object for a commission, yet if the depositions establish the bankruptcy, such probability merely will not be a ground for the court's interference to stop the progress of the commission. (2)

*Mere pro-  
bability.*

## SECTION II.

### *Of Applications for a Supersedeas by other Persons.*

The commission may also be superseded (for any of the causes specified in the previous section) upon the petition of other parties, as well as on the petition of the bankrupt. And if the *petitioning creditor* has not prosecuted the commission so far as to give an interest in it to others, he may apply, as a matter of course, to have it superseded, unless the bankrupt should oppose it. (3) A petitioning creditor, however, cannot supersede a commission without first applying to the Court; and where he did so in one case, upon receiving his debt from the bankrupt, he was ordered to refund the money which he had so received. (4) A commission of bankrupt is, in fact, an execution for *all creditors*; and the petitioning creditor, therefore, cannot receive his debt and supersede the commission, while the other creditors are (5) unsatisfied. Where, too, a petitioning creditor applies to supersede a commission, which is taken out with a different object from that which the law recognizes as the proper object of a commission, — the Lord Chancellor will supersede the commission, without prejudice

*By peti-  
tioning  
creditor.*

(1) *Ex parte Smith*, 1 G. & J. 56.

(2) *In re Lewis*, 2 Rose, 59.

(3) *Ex parte Prowse*, 1 G. & J.

(4) *Ex parte Thomson*, 1 Ves. 157.

(5) *Ex parte Stokes*, 7 Ves. 408.

*Applica-  
tions by  
creditors.*

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*As to ser-  
vice of  
petition;*

*by a gene-  
ral credi-  
tor.*

to the bankrupt's right of action; but will not give any direction for the petitioning creditor to issue another. (1) Where two commissions issued against a man, the first by a wrong name (though one he was in the habit of using) — and the second by his right name, — upon an application by the petitioning creditor under the second commission, the first was ordered to be superseded; for where there is a commission against a bankrupt by his *right name*, that ought to stand in preference to the other. (2) A petition by the petitioning creditor to supersede a commission (before it has been opened) ought to be served upon the bankrupt. (3)

So any other creditor of the bankrupt may, in an early stage of the proceedings, and for good cause shown to the Court, apply by petition for a *supersedeas*, notwithstanding he has proved his debt under the commission (4); for any objection on account of the proof of the debt, Lord Eldon said, must depend entirely upon the circumstances under which the proof had been made, as well as the conduct of the creditor — and that he would lay down no general rule upon the subject. (5) The petition of the creditor must contain an allegation, that the petitioner is a creditor; or it will not be heard. (6) And where the affidavit (in support of the petition) stating that the petitioner is a creditor, is contradicted by the examination of the bankrupt before the commissioners, — an inquiry will be directed, as to whether the petitioner was a creditor, so as to entitle him to petition. (7) It seems that a creditor, who is proceeding against the bankrupt at law, must consent to discontinue the action, if he applies to supersede

(1) *Ex parte Smith*, 1 Rose, 333.

(2) *Ex parte Schofield*, 2 Rose, 246.; and see *Stevens v. Elizee*, 3 Camp. 256.

(3) *Anon.* 1 G. & J. 23.

(4) 2 Rose, 33. *Ex parte Bonser*, *ibid.* 61.

(5) 2 Rose, 62. In 2 Mad. 281. it is reported to have been held,

that a creditor, who has not proved, cannot petition to supersede a commission. *Sed quære.*

(6) *Ex parte Orley*, 1 G. & J. 12.

(7) *Ex parte Fowler*, Buck, 92.; and see *Ex parte Rold*, 1 Com. 423.



the commission; for if he will not do so, he has nothing to do with the commission, nor any resource to the great seal. (1) Any tampering of a creditor with the bankrupt will cause the Chancellor to dismiss the petition. But when a creditor, honestly believing a commission to be invalid, does not prove under it — but (acting adversely) declares to the bankrupt and his friends, that he means to petition for a *supersedeas* unless his debt is paid, — this is not such a tampering, as will bar his petition for the *supersedeas*. (2) After the bankrupt, however, has obtained his certificate, the commission will not be superseded, unless a case of fraud is made out against him — or the invalidity of the commission appears on the face of the proceedings. (3) And if he has conducted himself honestly, the commission will not be supersedable by the creditors after certificate — although there is an objection to the trading, the petitioning creditor's debt, or the act of bankruptcy — and though debtors to the estate upon that ground refuse to pay the assignees. (4) If the Lord Chancellor makes any order upon such a petition, it will be to direct an issue to try the bankruptcy; for after the bankrupt has got his certificate, a creditor can have no action at law against him — as the certificate (unless it has been obtained by fraud, or is void under the statute) is a conclusive bar against him — that of itself being evidence of the trading, act of bankruptcy, &c. And where a commission was proceeded upon in the usual manner, and all the creditors had acquiesced in it, and the whole was completely finished, — Lord Hardwicke refused to supersede it on a petition of the creditors — which suggested that an action had been brought by the assignees to recover some part of the bankrupt's property — and that, a witness having stated that an act of bankruptcy was committed before the petitioning creditor's

*Applications by creditors.*

In case of any tampering, petition will be dismissed.

Commission not in general supersedable by creditors after certificate.

(1) *Ex parte Joseph*, 1 Rose, 189.

(3) *Ex parte Levi*, Buck, 75.

*Ex parte Hardenbergh*, *ibid.* 206.

(4) *Ex parte Crowder*, 2 Rose,

(2) *Ex parte Paterson*, 1 Rose, 402.

324.; and see *Ex parte Moule*, 14 Ves. 602.

*Applications by creditors.*  
—

except in cases of fraud.

Preference of petitioning creditor.

Act of bankruptcy concerted.

debt accrued, (which, under the former law, rendered a commission invalid,) the assignees submitted to a nonsuit; — for such submission of the assignees was held to be not a sufficient determination of the bankruptcy; — and the act of bankruptcy, also, (stated to be proved by the witness at the trial) was considered in this case to be somewhat of a doubtful nature. (1) But in all cases of *fraud*, the Court will never refuse to supersede the commission, without regard to any lapse of time even after the bankrupt has obtained his certificate. (2)

Two of the most usual grounds for the application on the part of the creditors are, any preference shown by the bankrupt to the petitioning creditor — or any concert with him in the issuing of the commission. Thus, where the petitioning creditor, though with the knowledge of two or three other creditors, receives his debt from the bankrupt after the issuing of the commission, — the commission will be superseded, even on the petition of a creditor privy to the transaction. (3) But it is doubtful, whether that creditor would be permitted to sue out a fresh commission. (4) So, where the commission is issued upon a concerted act of bankruptcy — or it appears to be clearly the commission of the bankrupt, and not of the creditor, and the bankrupt has evidently the management and direction of it — or where it has even been issued at the instance of the bankrupt, — the Lord Chancellor has been accustomed to supersede it. (5) Where concert is alleged, and the Court directs an issue to try the fact, it will direct the parties to the alleged concert to be examined at law. (6) But a trader may now, as we have before seen (7), by making a private declaration of his insolvency at the bankrupt office, commit a valid

(1) *Ex parte Desanthis*, 1 Atk. 145.; but see *Ex parte Bass*, 4 Mad. 270. ante, 684.

(2) *Ex parte Moule*, 14 Ves. 602. *Ex parte Poole*, 2 Cox, 227. *Ex parte Cutten*, Buck, 68.

(3) *Ex parte Brine*, Buck, 19.; and see ante, 807.

(4) *Ex parte Smith*, 1 Rose, 333.

(5) *Ex parte Staff*, Buck, 451. *Ex parte Prosser*, *ibid.* 77. *Ex parte Grant*, 1 G. & J. 17. *Ex parte Gouthwaite*, 1 Rose, 87. *Ex parte Edmonson*, 7 Ves. 503. *Ex parte Binner*, 1 Mad. 250, &c.

(6) *Ex parte Carter*, 1 G. & J. 326.

(7) Ante, 82.

act of bankruptcy to support a commission against him; and the 7th section expressly declares, that no commission founded on this act of bankruptcy shall be deemed invalid, by reason of such a declaration being concerted or agreed upon between the bankrupt and any of his creditors. It is not, therefore, very likely, that many commissions will in future issue upon the old concerted acts of bankruptcy, namely, the bankrupt agreeing with a creditor to deny himself, or to absent himself from his dwelling-house, &c. But if commissions do issue upon such concerted acts, it is apprehended, that the courts will deal with them as they have been hitherto accustomed to do; and will, indeed, be rather more disposed to view the case in a suspicious light, from the very circumstance of the bankrupt not choosing to avail himself of the mode (pointed out in the statute) for committing an act of bankruptcy, when he wishes a commission to issue against him.

*Applica-  
tions by  
creditors.*

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Another cause, for superseding the commission at the instance of a creditor, is, where there has been an unreasonable delay in the prosecution of it by the petitioning creditor — as where the adjudication is not made until nine months after the commission issued — notwithstanding the delay may be occasioned by the acts of the bankrupt, and may also be with the concurrence of most of the creditors. For the *public*, as well as the bankrupt and his creditors, are interested in the due prosecution of a commission; as, until the bankruptcy is declared, the bankrupt is in the situation of a person, with whom all the world ostensibly, and yet nobody in reality, can deal. (1)

*Unreason-  
able delay  
of peti-  
tioning  
creditor.*

The *assignees* may, also, apply to supersede a commission, even for defects appearing on the proceedings; but such an application will be watched with great jealousy; as it is their duty, in the first place, to do all in their power to clear any doubts as to the validity of the commission. (2)

*As to ap-  
plications  
by assign-  
ees.*

(1) *Ex parte Luke*, 1 G. & J. 361. (2) *Ex parte Grones*, 1 G. & J. 86.

*Applications by creditors.*  
 ———

So much, indeed, is it considered incumbent on them to support the commission, under which they derive their trust, that the Lord Chancellor will refuse to indemnify them against the consequences of a *supersedeas*, at whose-soever instance the same may be issued. (1)

### SECTION III.

#### *Of the Practice upon Petitions to supersede a Commission.*

When notice to creditors necessary.

Service of petition on bankrupt.

Affidavit of service.

When the party left to his action;

When the bankrupt applies to supersede a second commission — on the ground of a former one having issued against him, under which he has not obtained his certificate — he should give notice to the creditors under the first commission; this is done, by serving a copy of the petition on the assignees under the first two days at least before the day of petitions. (2) And it is a general rule, also, that every petition for a *supersedeas* by a creditor must be served upon the bankrupt, whether the commission has been opened or not. (3) An affidavit of service should also be made and filed; for the Court can act upon such an affidavit in cases of *supersedeas*, as well as in other cases. Where the ground of the application is a legal objection to the commission — if a great length of time (such as a year and a half for instance) has intervened between the issuing of the commission and the application — the Lord Chancellor will not grant an issue to try the bankruptcy, but leave the party to bring his action. (4) If the bankrupt is out of the kingdom, and there is a doubt of the bankruptcy, the Court will not supersede the commission on petition, but send it to trial: — if he is in England, and the question is

(1) In re *Bryant*, 2 Rose, 17.

(2) Ex parte *Irvine*, 1 Mad. 74.  
 Ex parte *Rhodes*, 15 Ves. 542.  
 2 Rose, 451.

(3) Ex parte *Barber*, Buck, 495.  
 Anon. 1 G. & J. 23.

(4) Ex parte *Nutt*, 1 Atk. 102.  
 Ex parte *Abell*, 1 G. & J. 199.; and  
 see ante, 806, 807.

involved in doubt, the Court will decide at once upon affidavits — or will sometimes send it back to the commissioners to consider, if, on evidence taken before them, they can declare the party a bankrupt or not. (1) Upon the hearing of all petitions to supersede a commission, the proceedings under it ought to be produced for inspection of the Lord Chancellor (2); who, though there be no affidavits on the other side in support of the commission, and no notice has been given that the proceedings will be produced, will nevertheless look into them, to see whether the depositions will support the commission. But though the Court itself will look at the proceedings, it will not permit the bankrupt to inspect them. (3) And yet (which is somewhat inconsistent with this rule) the bankrupt, when he applies for a *supersedeas*, is expected to give a *particular answer* to the facts charged in the depositions taken before the commissioners, as well as the affidavits on the other

*Practice.*

when the matter sent back to commissioners.

Proceedings must be produced.

Bankrupt not permitted to inspect them.

1) *Ex parte Gulston*, 1 Atk. 193.  
*Ex parte Lord*, 2 Ves. 26.

2) *Ex parte Dodson*, 1 Mont. L. 664.

3) *Ex parte Vypond*, 1 Mad.

4. It is, certainly, difficult to comprehend the justice of this rule of practice, which prevents the bankrupt from inspecting the proceedings against him, for the purpose of assisting him in applying to supersede the commission. In other cases, as it is justly observed by Sir Wm. Evans, a party has an opportunity of hearing and opposing the evidence, as well as of examining the documents upon which legal proceedings have been instituted against him; but here the opportunity is withheld; and if he wishes to arraign the regularity of the procedure, he must take his steps at random and in the dark. There is no other instance, indeed, in the whole compass of our jurisprudence, in which a person is thus affected in a judicial proceeding by evidence, which he has not an

opportunity to know, to comment upon, and to contradict. Whatever convenience may be derived from certain rules of practice in point of arrangement, there are nevertheless great and fundamental principles of justice, to which all matters of practical detail should be considered as essentially subordinate. When a party, therefore, wishes to appeal from what has been done, and to submit it to the regular course of examination and inquiry, there can be no motive of convenience sufficient to countervail that essential principle of justice, which requires that he should be at least admitted to know, to oppose, and to controvert (if he is able) the allegations of the opposite party and of witnesses, which (being taken in his absence) he had not at the time the opportunity to contradict, or to oppose — and upon which alone he may possibly have been involved in ruin.

**Practice.**

When the Court will direct an issue.

side ; — for a mere general affidavit that he is not a bankrupt has been held not sufficient to support the application. (1)

The Court will frequently, when the affidavits are contradicted and the evidence is conflicting, direct an issue to try the fact of the bankruptcy — the practice being to take the assistance of a jury, when there is so much of doubt, that such assistance is felt to be necessary to the right determination of the case. But though the affidavits are conflicting on both sides, yet the Court will not put the parties to the expense of a trial, without first hearing all the evidence read, and the case fully argued ; — unless the counsel on both sides agree, that such must necessarily be the result if the matter is gone into. (2)

When petition ordered to stand over.

When an issue is directed upon the petition of the bankrupt to supersede the commission, the Court will order the petition to stand over until such a fixed time, as in all probability the issue will be tried. (3) So, if it appear by the statement in a petition, that an action at law is commenced to try the validity of the commission, the Court will not supersede the commission, but defer the consideration of the petition until the event of the trial is known. (4)

Affidavit accounting for delay of trial.

When a particular must be delivered of the act of bankruptcy.

And if from any circumstance the trial does not take place within the prefixed period, the bankrupt must make an affidavit, satisfactorily accounting for the delay of the trial ; or his petition will be dismissed. (5) If, on such a petition, no act of bankruptcy appear on the proceedings, and the Court thinks fit to permit the assignees, or the petitioning creditor, to try whether or not there was any act of bankruptcy in an issue or an action, — it will require, that they deliver to the bankrupt previously to the trial a particular of the specific act or acts of bankruptcy, on which they in-

(1) *Ex parte Lingood*, 1 Atk. 241. *Ex parte Stokes*, 7 Ves. 405.

(2) *Ex parte Heygate*, Buck, 442. *Ex parte Trustrum*, Buck, 550.

(3) *Ex parte Ranken*, 3 Mad. 571. *Ex parte Bilbald*, Buck, 220.

(4) *Ex parte Price*, Buck, 230. 3 Mad. 228.

(5) *Ex parte Ranken*, *supra*.

tend to rely. (1) And, upon such an order, the plaintiff must in the notice not only specify the *acts* relied on — but also the *times* when they were committed, and the *witnesses* who will be called to prove them. (2) *Practice.*

When the Court directs the trial of an action at law, it is the intention to place the parties in such a situation, as though the action had originally commenced there (3); and after an order has been made, that a petition shall stand over with liberty to bring an action, &c., a bill of discovery cannot be filed by the bankrupt without leave of the great seal. (4) But where a material witness is abroad, and the court of law puts off the trial on that ground, the Lord Chancellor will order, that the bankrupt shall be at liberty to file a bill for a commission to examine the witness abroad. (5) When an action is directed to be brought, all proceedings under the commission are ordered to be suspended in the mean time; but if the action establishes the bankruptcy, the Court will not (without special ground) allow a longer suspension; nor is it a sufficient ground, that justice was not done to his case by his counsel in the first trial (6)—or that the bankrupt is about to bring another action, and therein to put his objections to the commission upon the record, in order to carry it by writ of error to the House of Lords. (7) And where the result of the action is to establish the commission, the petition to supersede it will be dismissed, without putting the assignees to the expense of a counter petition. (8) But if the bankrupt has a verdict in such an action, the Lord Chancellor will not in that case, unless under very special circumstances, delay superseding the commission until after another trial; and it is

When bill of discovery cannot be filed without leave.

When commission to examine a witness abroad.

When proceedings suspended.

When no need of a counter petition.

When the *superse-  
deas* will

(1) *Ex parte Sherwood*, 2 Rose, 162. 17 Ves. 416, 417.

(2) *Ex parte Bogen*, Buck, 137.; and see the form of such a notice, as settled by Lord Eldon, *ibid.* 144.

(3) Buck, 298.

(4) *Cooke v. Marsh*, 18 Ves. 209.

(5) *Ex parte Coles*, Buck, 293.

(6) 1 Ves. & B. 218, 219.

(7) *Ex parte Bryant*, 2 Rose, 1. 1 V. & B. 220.

(8) *Ex parte Caponhurst*, Buck, 476.

**Practice.**

not be  
delayed.

When new  
trial of an  
issue re-  
fused.

When  
parties  
ordered to  
be ex-  
amined.

Applica-  
tion for a  
new trial.

not a sufficient ground, that the assignees have evidence to support the commission, which they were prevented from producing by surprise; for, in such an action, assignees must be presumed to know that the bankruptcy is disputed, and ought to be provided with evidence to support it. (1)

So, where upon an issue to try whether a bankruptcy was concerted or not, the jury found that it was, — the Lord Chancellor refused to grant a new trial to prove other acts of bankruptcy not concerted; for the Court will never support a commission, which is founded on a fraudulent and illegal proceeding. (2)

In directing an issue, the Court will not, in general, order the examination of persons at the trial, who (by the rules of the courts of law) could not be examined without such order — except sometimes in cases, where the facts in dispute rest only on the knowledge of the plaintiff and defendant. (3) But where the case requires it, the Court will direct the bankrupt to be examined. (4) And where a petitioner swore positively to a debt, and was contradicted by the bankrupt, and there was no other evidence, — in this case, both the bankrupt and the petitioner were ordered to be examined. (5)

With respect to the mode of applying for a new trial, the practice differs, according as an issue, or an action, is directed by the Chancellor: — in the former case, the motion must be made to the Court by which the issue was directed — in the latter case, to the Court in which the action is brought; and the rule is not affected by any special provisions of the Chancellor as to imposing terms &c., by which the direction of the action is accompanied. (6) But a motion to put off the trial may be made in the court of law, as well upon an issue, as in an action. (7)

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|---|---|
| (1) <i>Ex parte Dick</i> , 1 Rose, 51.  | 546.; and see <i>Ex parte Carter</i> ,  |
| (2) <i>Ex parte Prosser</i> , Buck, 77. | 1 G. & J. 326.                          |
| (3) <i>Ex parte Dister</i> , Buck, 234. | (6) <i>Carstairs v. Stein</i> , 2 Rose, |
| (4) <i>Ex parte Staff</i> , Buck, 431.  | 178. 4 M. & S. 192.                     |
| (5) <i>Ex parte Williamson</i> , Buck,  | (7) <i>Burton v. Lawton</i> , 4 Camp.   |
|   | 163.                                    |



Where the assignee is not a creditor of the bankrupt, and is alleged to be so much identified in interest with him, that an action (brought by the bankrupt to try the validity of the commission) would not be properly tried if the assignee defended it, — the petitioning creditor has been directed to have the management of the defence, upon fully indemnifying the assignee. (1)

*Practice.*

When petitioning creditor ordered to defend.

Though a commission has not been opened, the Court will sometimes interfere by motion (2), and it may be superseded with the consent of the petitioning creditor (3); but it cannot be superseded before it has been sealed, though the Chancellor will in a case of hardship give directions that it shall not be sealed. (4)

Commission not supersedable before sealing.

A bankrupt, as well as any other suitor, whose circumstances require it, may petition *in forma pauperis* to supersede a commission. (5)

Bankrupt may petition in *forma pauperis*.

The Vice-Chancellor has authority to hear a petition to supersede a commission (6), as well as a petition for a writ of *procedendo* to issue, where a commission has been superseded by the Lord Chancellor's confirmation of his order for the *supersedeas* (7); and he may also certify the propriety of awarding a *procedendo*, where a commission has been superseded upon his certificate. (8)

Vice-Chancellor's authority as to the *supersedeas*.

Where sales of the estate have taken place under the commission, the Lord Chancellor has sometimes required an affidavit from the bankrupt of his confirmation of all purchases under it, before he would supersede it (9); and, at other times, has refused to supersede it altogether (10), even though it has been fraudulently issued (11); but the

When sales have taken place.

(1) *Ex parte Stewart*, 2 Rose, 6.

(2) 1 Mont. Dig. 134.

(3) *Ex parte Trigwell*, 1 V. & B. 348.

(4) *Ex parte Williams*, 2 Ves. & B. 255.

(5) *Ex parte Northam*, 2 V. & B. 124. 2 Rose, 140.

(6) 1 Mont. Dig. 141. 2 Rose, 235. note (a).

(7) *Ex parte Hurd*, Buck, 45.

(8) *Ex parte Crump*, Buck, 3.

(9) *Ex parte Milner*, 19 Ves. 204.

(10) *Twogood v. Hankey*, Buck, 67.

(11) *Ex parte Edwards*, 10 Ves. 104.

**Practice.** not a sufficient ground, that the assignees have evidence to support the commission, which they were prevented from producing by surprise; for, in such an action, assignees must be presumed to know that the bankruptcy is disputed and ought to be provided with evidence to support it.

not be delayed.

**When new trial of an issue refused.** So, where upon an issue to try whether a bankruptcy was concerted or not, the jury found that it was, — the Lord Chancellor refused to grant a new trial to prove other than of bankruptcy not concerted; for the Court will not support a commission, which is founded on a fraudulent and illegal proceeding. (2)

**When parties ordered to be examined.** In directing an issue, the Court will not, in general order the examination of persons at the trial, who (by the rules of the courts of law) could not be examined without such order — except sometimes in cases, where the facts in dispute rest only on the knowledge of the plaintiff and defendant. (3) But where the case requires it, the Court will direct the bankrupt to be examined. (4) And where a petitioner swore positively to a debt, and was contradicted by the bankrupt, and there was no other evidence, — in this case, both the bankrupt and the petitioner were ordered to be examined. (5)

**Application for a new trial.** With respect to the mode of applying for a new trial the practice differs, according as an issue, or an action, is directed by the Chancellor: — in the former case, the application must be made to the Court by which the issue was directed — in the latter case, to the Court in which the action is brought; and the rule is not affected by any special provisions of the Chancellor as to imposing terms &c., by which the direction of the action is accompanied. (6) But a motion to put off the trial may be made in the court of law, as well upon an issue, as in an action. (7)

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|---|---|
| (1) Ex parte <i>Dick</i> , 1 Rose, 51.  | 546.; and see Ex parte <i>Carr</i> .    |
| (2) Ex parte <i>Prosser</i> , Buck, 77. | 1 G. & J. 326.                          |
| (3) Ex parte <i>Dister</i> , Buck, 234. | (6) <i>Carstairs v. Stein</i> , 2 Rose. |
| (4) Ex parte <i>Staff</i> , Buck, 431.  | 178. 4 M. & S. 192.                     |
| (5) Ex parte <i>Williamson</i> , Buck,  | (7) <i>Burton v. Lawton</i> , 4 Carr    |
|   | 163.                                    |

rupt merely to collect the debts. (1) And, indeed, the same effect would be produced by a *supersedeas*, under the provisions of the present statute. But the title also of purchasers under the commission was, before the late act, in like manner entirely defeated by the *supersedeas* (2), — the effect of which was considered to divest the estates previously conveyed to the assignees by the assignment and bargain and sale; for which reason the Lord Chancellor, as has been before observed, frequently refused to supersede a commission (and this even upon the consent of all the creditors) where *boná fide* purchasers were in possession of any part of the bankrupt's property — unless the bankrupt chose to confirm the purchases under which they claimed. (3) And for the same reason, where a first commission was superseded in favour of a second commission, it was always the practice of the Court to call upon the assignees under the *second* commission to confirm any sale made by the former assignees. (4)

*Of the effect of the supersedeas.*

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This indiscriminate and general effect of the *supersedeas* is restrained in some measure by the new statute. For now (by *section 87.*) no title to any real or personal estate sold under any commission, or under any order in bankruptcy, can be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, — unless the bankrupt shall have commenced proceedings to supersede the commission, and duly prosecuted the same *within twelve calendar months* from the issuing thereof. And by *section 94.*, if the commission be superseded, all persons from whom the assignees shall have recovered any real or personal estate, either by judgment or decree, are discharged from all demands by the bankrupt — as well as all persons who shall without

No title can now be impeached unless the bankrupt prosecutes a *supersedeas* within twelve months.

Indemnity of persons, if commission superseded.

(1) *Ex parte Leaverland*, 1 Atk. 145. 10 Ves. 104. *Twogood v. Hankey*, Buck, 67.

(2) *Ex parte Jackson*, 8 Ves. 533.

(4) *Ex parte Smith*, Buck, 262.

(3) *Ex parte Milner*, 19 Ves. 204.; and see *Ex parte Edwards*,

in note.

Of the effect of the *supersedeas*.

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After commission is superseded creditor may proceed with his action.

Lord Chancellor's jurisdiction not determined by the *supersedeas*.

action or suit *bonâ fide* deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them ; — provided no notice to try the validity of the commission has been given by the bankrupt, and been proceeded in, within the time and in manner required by the act.

Where a commission is superseded, after a creditor (at whose suit the bankrupt is detained in custody) has proved under the commission—in consequence of which the bankrupt has been discharged,—the creditor, we have seen in a former chapter (1), may proceed in the action as if he had not proved his debt. Accordingly, where a bankrupt was discharged from an execution, which was pending against him at the time of the proof of the execution creditor—and the commission was afterwards superseded, on the ground of its being fraudulently issued to defeat the plaintiff's claim,—it was held, that the bankrupt might be retaken under the execution. (2)

The jurisdiction of the Lord Chancellor, it has been also observed (3), is not determined by the superseding of the commission, as far as respects all acts which have been done under it *before* it was superseded. (4) The Lord Chancellor has, therefore, even *after* the *supersedeas* a discretionary power still to grant relief to any person, who has been injured by the operation of the commission during the period of its existence. Indeed, from the tenor of the writ of *supersedeas*, it would seem, that its effect was in reality not absolutely to *vacate* the commission, but merely to render it *dormant* (5); for it commands the commissioners only “to *stay and cease all further proceedings* upon the commission,”—without directing the commission itself to be *quashed* or *cancelled*.

(1) Chap. IX. Sect. 2.

(2) *Baker v. Ridgway*, 2 Bing. 42. This could not formerly be done. See ante, 184, note (2). *Jaques v. Withy*, 1 T. R. 557. *Turner v. Hayne*, 7 T. R. 420. *Vigers v. Aldrick*, 4 Burr. 2482. *Blackburn v. Stupart*, 2 East, 243.

(3) Ante, 13.

(4) Ex parte *Bernal*, 11 Ves. 558. Ex parte *Warren*, 1 Rose, 276. 19 Ves. 162. Ex parte *Factor*, Buck, 428. Ex parte *Cowan*, 3 B. & A. 123.

(5) Buck, 200. note (e); and see post, “Procedendo,” and Vol. II.

Where a commission has been superseded on the ground of there not being a valid petitioning creditor's debt, and a fresh commission has been issued, and the same assignees chosen, — it has been determined, that they cannot enforce the performance of a contract of sale of property made by them under the first commission; for, not being *then* able to prove a good petitioning creditor's debt, they could not at the period of the contract make out a valid title. (1)

*Of the effect of the supersedeas.*

Where contract of sale under a first commission cannot be enforced.

## SECTION V.

### *Of the Writ of Procedendo.*

The writ of *procedendo* issues under the Great Seal, upon the special order of the Lord Chancellor; and it is granted for the purpose of ordering the commission to be proceeded in, when it has been suspended by a writ of *supersedeas* issued without sufficient cause. It operates in the same way with respect to commissioners of bankrupt, as it does with respect to commissioners of *oyer and terminer*, and justices of the peace; — whose authority, when suspended by writ of *supersedeas*, may be restored by the writ of *procedendo*. (2) This latter writ recites the previous writ of *supersedeas*, which (as has been already observed) does not, in strictness, render the commission absolutely void, but merely suspends its operation; though (whilst it does continue in force) it is held to avoid all acts that have been previously done under the commission, — a consequence, however, that seems to be scarcely warranted from the language of the writ. (3) The *procedendo* directs the commissioners to proceed upon the commission, and to put the same in execution, as if the same had not been superseded. The effect of the writ is, therefore, to place

Operation and effect.

(1) *Bartlett v. Tuchin*, 1 Marsh, 35. 2 Rose, 436.

(2) Regist. 124. 12 Ass. 21. H. P. C. 162. 1 Bl. Com. 353.

(3) See ante, 832.

*Of the  
proce-  
dendo.*

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In what  
cases  
granted.

every thing in the same situation as if the *supersedeas* had not issued. But there is so much caution now observed by the Court in issuing the *supersedeas*, that it is seldom necessary in practice to apply for a writ of *procedendo*. In two modern cases, where it appears to have been granted — the petitioning creditor was, in one, prevented from prosecuting the commission by the artifices of two persons, whose object was to delay the prosecution of the commission until after two months had expired, so as to give effect to certain transactions between them and the bankrupt, which the commission (if not superseded) would have overreached ; — and Lord Eldon, under these circumstances, directed the writ of *supersedeas* to be quashed, and a *procedendo* to issue. (1) In the other case, where the witness to prove the act of bankruptcy was kept out of the way by the bankrupt and his wife, for the purpose of avoiding the service of the summons to attend the commissioners, and the petitioning creditor was by that means prevented from prosecuting the commission to adjudication, — a writ of *procedendo* was directed by the Lord Chancellor to issue, after the commission had been superseded (upon the petition of the bankrupt) for want of prosecution (2) under the general order.

As to Vice-  
Chancel-  
lor's au-  
thority.

A petition for a writ of *procedendo* cannot, strictly, be heard before the Vice-Chancellor, unless the Lord Chancellor directs it to be heard before him. (3) But in a case, where a commission was superseded upon the certificate of the Vice-Chancellor, Sir Thomas Plumer thought that he might, of his own authority, hear a petition for a writ of *procedendo* to issue, and certify the propriety of awarding such writ. (4)

(1) *Ex parte Knight*, 2 Rose, 319.

(2) *Ex parte Bowler*, Buck, 258.

(3) *Ex parte Hard*, Buck, 45.

(4) *Ex parte Cramp*, Buck, 3.

## CHAP. XXI.

OF THE PRACTICE OF THE COURT ON PETITION IN BANK-  
RUPTCY.

THE innumerable applications now made to the Chancellor sitting in bankruptcy by the different parties interested in the administration of a bankrupt's effects, have rendered it highly essential, that certain rules of practice should be adopted by the Court, and strictly acted upon, in order for the due dispatch of the multiplicity of bankrupt business, consuming so large a portion of the time of the Lord Chancellor. Accordingly, during the long period that Lord Eldon has held the Seals, many beneficial regulations have been made with regard to the practice of the Court in various matters of bankruptcy—all of which are left untouched by the recent statute; the 135th *section* expressly providing, that nothing therein contained shall alter the present practice in Bankruptcy, except where any alteration is expressly declared.

The *jurisdiction* upon petition in Bankruptcy having been already fully considered in discussing the jurisdiction of the Lord Chancellor (1), it is the purpose of the present chapter to treat only of such matters, as relate to the *general practice* of the Court upon petition—and which have not been touched upon in the previous examination of particular proceedings. With respect, however, to petitions for payment of dividends (2), for staying the certificate (3), and for a supersedeas (4), the reader is referred to the former parts of this work, where the practice under each of these heads has been fully stated.

(1) Ante, Chap. I.

(2) Ante, 505.

(3) Ante, 587.

(4) Ante, 824.

When application by *petition*, and when by *motion*.

The proper and usual course of making any application to the Lord Chancellor *in Bankruptcy* is by *petition*—except, indeed, in cases of contempt, where the application may be by motion (1)—and in cases, also, of applying for a *habeas corpus*, when the proceedings *ought* to be by *motion* (2), though the writ has been granted in some few instances on petition. (3) An application by motion, also, has been sometimes entertained before the commission has been opened (4)—or for the amendment of the minutes of an order (5)—or for a special order as to service. (6) It is a general rule, that a *petition* should not be presented, where relief is provided for by a *general order*—otherwise it will be dismissed with costs. (7)

When petition will not lie.  
May be in the alternative.

A petition may be framed in the alternative; and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances. (8)

Title.

A petition should be properly entitled *in the bankruptcy*, or it cannot be heard; for if it is headed “*in Chancery*,” no order in bankruptcy can be made upon it. (9) And where a petition by assignees under a joint commission to supersede a separate commission, (which had been issued against one of the bankrupts,) was entitled in the *joint commission only*, it was held bad; but the Court, in such a case, will allow the petition to stand over for the purpose of amending the title. (10)

Petition should not be multifarious.

No statements should be made in a petition, which are inconsistent with the legitimate object of the relief it prays. For though an order might be made upon one part of it, yet where there is much groundless imputation against

(1) Ex parte *Morgan*, 1 Rose, 192. Anon. 1 Rose, 230.

(2) 7 Ves. 425. *Taylor's case*, 8 Ves. 328. Ex parte *Tomkinson*, 10 Ves. 106. Ex parte *Hiams*, 18 Ves. 237.

(3) Ex parte *James*, 1 P. Wms. 610. Ex parte *Lingood*, 1 Atk. 240. 1 Swanst. 31.

(4) 1 Mont. Dig. 134.

(5) Ibid.

(6) Ex parte *Anderson*, Buck, 56. Ex parte *Peyton*, ibid. 200.

(7) Ex parte *Watts*, 1 Rose, 436.

(8) Ex parte *Scholey*, Buck, 476.

(9) Ex parte *Glandfield*, 1 G. & J. 387.

(10) Ex parte *Mills*, Buck, 230.; and see Ex parte *Bedden*, 1 Rose, 310. Ex parte *Rew*, 1 Mad. 309. Ex parte *Byron*, 2 Rose, 368.



a party, the whole will be dismissed with costs. (1) But when a petition contained only two points, Lord Eldon did not think that he was prevented from making an order as to one, because he could not make an order as to the other. (2) Where the prayer of a petition was to expunge a charge of collusion made in another petition, and to be heard before that petition came on, — the last petition was dismissed with costs; for the Lord Chancellor said, that he could not possibly decide whether there was any foundation for the charge or not (3), without previously hearing the matter complained of in the first petition. A petition, also, to expunge the proofs that had been made by various creditors upon certain bills of exchange, was dismissed, on the ground of being multifarious. But the Vice-Chancellor refused to give costs to the creditors who opposed this petition; as that, he said, would be to make those creditors, whose debts were beyond dispute, contribute to the defence of doubtful debts. (4)

A creditor cannot present a petition to prove, until the commissioners have rejected his proof; and the petition must, also, state the grounds of their rejection of it. (5) Therefore, where a creditor, after attempting to prove £,000*l.* before the commissioners, petitioned to prove £0,000*l.*, — the petition was dismissed. (6)

Petition to prove.

By a general order of Lord Eldon's (7), all petitions in bankruptcy presented for hearing must, before they are presented, be respectively signed by the petitioners, except in case of partnership, or absence from the kingdom; in the former of which cases, the signature of one of the parties will be deemed sufficient; and in the latter case, the petition must be signed by the person presenting it on behalf of the person abroad. The signature, also, of each

General order as to signature, and attestation of petition.

- 1) *Ex parte Vernon*, 13 Ves.
- 2) *Ex parte Ross*, 1 Rose, 37.
- 3) *Ex parte Leigh*, Buck, 132.
- 4) *Ex parte Coles*, Buck, 256.
- 5) *Ex parte Wilson*, 1 Cox, 308.

- Ex parte Wright*, 2 Ves. jun. 41.
- Ex parte De Tastet*, 1 V. & B. 280.
- Ex parte Curtis*, 1 Rose, 274. *Ex parte Schmaling*, Buck. 93.
- (6) *Ex parte Fry*, 5 Mad. 132.
- (7) 12th August, 1809.

**Attestation.**

When attestation may be amended.

When attestation dispensed with.

Application for petition to stand over.

Service of petition.

law or equity. (1) A mere omission as to the description of the solicitor in the attestation of the petition, may (as well as a mistake in the title) be amended upon an application to the indulgence of the Court for that purpose, the petitioner undertaking to pay the costs of the day; but if the mistake is incapable of being rectified, the petition will be dismissed with costs. (2) When a solicitor presents a petition in his *own* behalf, attestation is in that case dispensed with. (3)

When an application is made that a petition may stand over, the strict mode of proceeding is by petition presented for that purpose, — though Lord Eldon said, he never knew the application by motion objected to. (4) But no application to hear a petition out of its turn can be entertained, unless notice of the intention to make such application has been given to the other side. (5) And a petition will not be permitted to stand over, for the purpose of replying to affidavits, unless the application be made at least two days before the petition appears in the paper. (6)

Petitions in matters of bankruptcy should be, in general, *personally served* upon the other party interested in the matter of the petition, by delivering a copy of it to him at least two days before the day of petitions. (7) But when the party is abroad, or wilfully keeps out of the way, a special order as to the service may be obtained by an application to the Court for that purpose, which, it seems, may either be by petition or on motion. (8) Thus, a petition to expunge a debt may, when the creditor is abroad, be served (with leave of the Court) upon the attorney, who is appointed to receive the dividends upon the proof. (9) And, under certain circumstances, where a party to be affected by a petition is out of the kingdom, the Court will

(1) *Ex parte Thompson*, 1 G. & J. 308.

(2) *Ex parte Rawlinson*, 1 G. & J. 19. *Ex parte Bury*, *supra*.

(3) *Ex parte Kingdon*, 1 Mad. 446.

(4) *Ex parte Gitton*, Buck, 549.

(5) *In re Bell*, 1 G. & J. 182.

(6) *Ex parte Wiltshire*, Buck, 232.

(7) 1 Mad. 74. 595. 15 Ves. 542.

(8) Buck. 38. *ibid.* 200.

(9) *Ex parte Peyton*, Buck, 200.

was, "Witness to the signature, J. Mortlock, Solicitor," who was not the solicitor presenting the petition,—the Vice-Chancellor held the attestation in every way insufficient; as it did not even state him to be solicitor for the petitioners, nor specify whether he was witness to the signature of both, or of which of the two petitioners. (1)

*Attestation.*  
—

An attestation by the *agent* to the petitioner's *solicitor* is not in conformity with the terms of the order, which requires the attestation to be by the *petitioner's* solicitor or agent (2)—though, in one case, where the petition was attested by the agent of the solicitor, and, afterwards, authenticated by the solicitor, it seems that such attestation was held sufficient. (3) And where the solicitor had not actually witnessed the signature of the petitioner, which purported to be "*authenticated*", not "*attested*", by the solicitor—who put his name to it from a knowledge of the petitioner's hand-writing—the Lord Chancellor thought, in this case, that the spirit of the order had been complied with; as its object was to have the pledge and responsibility of a solicitor of the court to the propriety of the application. (4) But in a similar case before the Vice-Chancellor, he thought that *authentication* was not equivalent to *attestation*; and that the intention of Lord Eldon, in the last case, was to relieve against the mistake in that particular instance, and not to establish a general rule by his decision. (5)

Attestation by solicitor's agent insufficient.

Quære, whether authentication sufficient.

Where the solicitor attesting the petition was at the time in prison, it was held not an objection to the validity of the petition within the 12 Geo. 2. c. 13. s. 2., which makes void any process (sued out by a solicitor in prison) in any court of law or equity; for so highly penal a clause, it was considered, should be construed strictly; and a petition in bankruptcy is not, strictly speaking, a proceeding either in

Solicitor in prison no objection to attestation.

(1) 1 G. & J. 355. note (a).

(2) Ex parte *Hirst*, 1 G. & J. 76.

(3) Ex parte *Bellott*, 2 Mad. 259.

(4) Ex parte *Tilley*, 2 Rose, 83.

(5) Ex parte *Bury*, Buck, 393.

**Affidavits.** waiver of the objection that the first was prematurely sworn (1) — that is, provided the respondent had notice of the irregularity (2); though a party is not precluded, by filing affidavits as to the merits, from objecting to the jurisdiction. (3) Affidavits in support of petitions may be likewise objected to, if filed subsequently to the petition day (4); though in one case they were specially permitted to be filed after the petition day, the petition standing over to give time for answering them, and the petitioner paying the costs of the day. (5) But an affidavit in support of a *motion* may be filed at any time. (6)

before  
whom  
should be  
sworn;

No affidavit should be sworn before a master extraordinary who is solicitor to the commission (7), or who is the clerk to such solicitor (8); for, if it be, it cannot be read. But if the agent in town is the solicitor to the commission, it would be then no objection to the affidavit, that it was sworn before the party's own solicitor in the country. (9)

should be  
pertinent  
to matter  
of petition.

An affidavit, as well as the petition (10), should be pertinent to the matter of the petition; for if it contains irrelevant or scandalous allegations, it will be ordered to be taken off the file — with costs against the party making it, as between attorney and client. (11)

Amend-  
ment.

A defect in any affidavit in support of a petition may be, in general, amended, by applying to the Court for liberty to reswear it, and to permit the petition in the mean time to stand over. (12)

Affidavits  
in reply.

Affidavits in *reply* cannot be filed, except as to new matter contained in those filed, in answer to the petition;

(1) Ex parte *Gilpin*, 1 G. & J. 183.

(2) Ex parte *Bury*, Buck, 393. Ex parte *Peel*, *ibid.* 394. Ex parte *Smith*, *ibid.* 395.

(3) Ex parte *Allison*, 1 G. & J. 210.

(4) 2 Rose, 161. Buck, 549.

(5) Ex parte *Sparrow*, 2 Mad. 184.

(6) Ex parte *Gilton*, Buck, 549.

(7) Ex parte *Brockhurst*, 1 Rose,

145.

(8) Ex parte *Green*, 1 G. & J. 16.

(9) *Read v. Cooper*, 5 Taunt. 89.

(10) Ante, 837.

(11) Ex parte *Simpson*, 15 Ves. 476. Anon. 3 V. & B. 93.

(12) 1 Rose, 145. 1 G. & J. 16.

and, in that case, the Court will permit a petition to stand over, to enable the party to reply to such new matter (1) — provided the application is made two days before the petition appears in the paper. (2) And, where the respondents were too late in filing their affidavits in answer to the petition, the Vice-Chancellor, upon the application of the petitioner, allowed the petition to stand over, to give the petitioner an opportunity of considering the affidavits, and of replying to them if necessary; and as the delay was occasioned by the conduct of the respondents, he ordered them to pay the costs of the day. (3)

*Affidavits.*

When a matter in bankruptcy is referred to a Master, and he finds it necessary to examine witnesses, a certificate should be procured from him of the necessity of such examination, upon which the Court will make the usual order. (4) But any affidavits, which might have been read at the hearing of the petition in court, may be received in evidence by the Master. (5) Upon a petition for leave to except to the Master's report of costs, the petitioner must pay the taxed costs into court. (6)

When reference to the Master, affidavits may be received.

At the hearing of every petition, the proceedings under the commission should be in court; as it is often necessary that they should be inspected by the Lord Chancellor, before he makes an order upon the matter of the petition. But the examination of the bankrupt before the commissioners cannot be read upon the hearing, unless notice has been given of an intention to make use of it. (7)

The practice of the Court in directing an *issue*, or an *action at law*, upon the hearing of a general petition in bankruptcy, is the same as upon a petition for a *superseas*, — for which the reader is referred to the preceding chapter. (8)

(1) *Ex parte Shayle*, Buck, 244.

(2) *Ex parte Wiltshire*, *ibid.* 232.

(3) *Ex parte Doncaster*, Buck, 163. *Ex parte Trustram*, *ibid.* 464.

(4) *Anon.* 4 Mad. 379.

(5) *Ex parte Jackson*. *Ex parte Heywood*, 1 Rose, 45.

(6) *Ex parte Leigh*, 4 Mad. 394.

(7) *Ex parte Stracey*, 1 Rose, 68.

(8) *Ante*, 826.

**Affidavits.**

When petitioner does not appear.

If, upon the day appointed for the hearing, the petitioner does not appear when the petition is called on, the respondent must in that case produce an office copy of the affidavit of service before the rising of the Court, in order to be entitled to costs. (1)

Service of order in bankruptcy.

An order made upon the hearing of any petition in bankruptcy must, like the petition itself, be personally served upon the party on whom the order is made. But where a party keeps out of the way to avoid the service, the Court, upon affidavit of the fact, will in that case direct, that service of the order at the house or office of the party shall be deemed good service. (2)

When default made in payment of money under an order.

When under an order in bankruptcy money is directed to be paid, the next order is to pay within four days, or stand committed. (3) The practice in Bankruptcy differs in this respect from the practice in Chancery, where an intermediate order *nisi* is necessary before the final order.

Petition for rehearing.

Upon a petition for rehearing, the order may be obtained upon an *ex parte* application; and it is not necessary to give notice to the other side. (4) And, upon any appeal to the Lord Chancellor from an order of the Vice-Chancellor, the petition requires the signature of Counsel. (5)

(1) *Ex parte Astell*, Buck, 396.  
 (2) *Ex parte Anderson*, Buck, 227.  
 38.; and see *Ex parte Bowler*, *ibid.* 258.

(3) *Ex parte Davison*, 1 G. & J.  
 (4) *Ex parte Hensor*, Buck, 427.  
 (5) *Ex parte Holt*, Buck, 422.

## CHAP. XXII.

## OF COSTS.

SECT. 1. *Of the Costs of issuing a Commission up to the Choice of Assignees.*

2. *Of subsequent Costs.*

3. *Of Costs upon Petition.*

4. *Of Costs in Actions and Suits by and against Assignees, and other Parties concerned in the Commission.*

5. *When Security for Costs will be required.*

For the *Proof of Costs* under the commission, see *ante*, Chap. IX. Section 19.

## SECTION I.

*Of the Costs of issuing the Commission.*

**T**HE petitioning creditor must prosecute the commission at his own costs until the choice of assignees (1); when the commissioners are directed by the statute to ascertain such costs, and order the assignees to reimburse him out of the first money that is got in under the commission. The bill of these costs, when taxed and allowed by the commissioners, should be filed and kept with the proceedings. If any party is dissatisfied with the taxation of them by the commissioners—and indeed this was the *practice* before the recent statute (2)—he may petition the Lord Chancellor to refer it to a Master to review their

Petitioning creditor liable in the first instance.

When reference to the Master to tax.

(1) 6 G. 4. c. 16. s. 14.

(2) *Ex parte Vincent*, 1 C. B. L.

11. *Ex parte Clarke*, *ibid.* *Ex parte Thelwall*, 1 Rose, 397.

*Of issuing  
the com-  
mission.*

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taxation; but such an application is not a matter of course, without stating particular objections to the taxation of the commissioners; though it may be so in an ordinary case, when the bill has not been previously taxed. (1) If the solicitor, however, refuses a copy of his bill, *that* is a sufficient ground for referring it to a Master. (2) Where the charges, too, appeared to be exorbitant — as where they amounted to 109*l.*, — that, of itself, was held a sufficient reason to order the bill to be taxed, even after payment made, and after the death of the assignee who made the payment. (3) If there is no necessity for a provisional assignment, the expense of it will not be allowed in taxation. (4)

*Petition-  
ing credi-  
tor's right  
to reim-  
bursement.*

The provision in the statute, for ascertaining the costs when the assignees are chosen, is merely directory; and it will be no objection to the petitioning creditor's right to be reimbursed, that all the costs of prosecuting the commission (previous to the choice of assignees) were not then actually taxed by the commissioners. (5) When an assignee happens to be removed, the petitioning creditor cannot claim the costs from such removed assignee, unless any collusion can be proved between him and the existing assignees. (6)

*Petition-  
ing credi-  
tor liable,  
though no  
assets.*

In case there are not sufficient assets, the petitioning creditor, and not the assignees, is personally liable to the solicitor for the costs up to the choice of assignees. (7) But in one case of this kind, the Vice-Chancellor said, that he had no jurisdiction to order the petitioning creditor to pay these costs, though he was liable to the solicitor in an action at law like any other client. (8) In another case, however, where a commission was even superseded by the

(1) *Ex parte Hewitt*, Buck, 588.

(2) *Ex parte Sutton*, 4 Mad. 395.  
479.

(3) *Ex parte Neale*, Buck, 111.

(4) *Ex parte M<sup>r</sup> Williams*, 1 Mad.  
141.

(5) *Ex parte Haynes*, 1 G. & J.

35.

(6) *In re Gibson*, 1 G. & J. 303.

(7) *Ex parte Haynes*, *supra*; and  
see ante, 102.

(8) *Anon.* Buck, 475.; and see  
post, "Solicitor."



bankrupt for invalidity, the Court there made an order on the petitioning creditor to pay the messenger his bill up to the choice of assignees. (1)

*Of issuing  
the com-  
mission.*

## SECTION II.

### *Of Costs subsequent to the choice of Assignees.*

Before the new act the commissioners had only power to tax the costs up to, and including the choice of assignees (2); the taxation of all subsequent costs being directed (3) to be made by a Master in Chancery. This limitation of the jurisdiction of the commissioners was found to be very inconvenient in practice; as the taxation of the bill by a Master is attended with considerable more expense and delay; and this the assignees were either obliged to incur, or else were compelled to submit to improper charges. A remedy, however, is provided for this inconvenience by the present statute (4), which directs, that all bills of fees or disbursements of any solicitor or attorney, for business done after the choice of assignees, shall be settled by the commissioners, except so much of such bills as may contain any charge respecting any action or suit, which is to be settled by the proper officer of the Court. And if any creditor to the amount of 20*l.* be dissatisfied with the taxation of the commissioners, he may have the bill taxed by a Master in Chancery, who is to receive for the taxation and the certificate thereof 20*s.*, and no more.

*Subse-  
quent costs  
now tax-  
able by  
the com-  
missioners.*

*When  
they may  
be taxed  
by a  
Master.*

As to the costs of any action, suit, or other proceeding, the assignees themselves are personally answerable for these costs to the solicitor whom they employ (5); but in case of a deficiency of assets, (though there is no provision of this kind in the statute,) they, perhaps, might come for contribution upon

*Assignees  
liable for  
subse-  
quent  
costs.*

(1) *Ex parte Johnson*, 1 G. & J. 23.

(2) 5 G. 2. c. 30. s. 25.

(3) *Ibid.* section 46.

(4) Section 14.

(5) 2 Camp. 175. 1 Star. 278.;  
and see ante, 329.

the creditors who have proved debts under the commission, provided such costs were legally and properly incurred, and the proceeding was instituted with the sanction of the creditors. But if the assignees choose to prosecute a suit in equity, without the consent of the major part in value of the creditors of the bankrupt (pursuant to the provision of the 88th *section* of the new statute) (1), — they cannot, in that case, come either upon the creditors or the estate of the bankrupt for the costs of such suit, though they are personally liable themselves to the solicitor employed by them (2).

Assignees  
to keep an  
account.

Audit of  
accounts.

With respect to the general costs of working the commission, the assignees are directed (by the 101st *section* of the new statute) to keep an account of all payments made by them on account of the bankrupt's estate; which account, every creditor who has proved a debt, has a right at all reasonable times to inspect. And by the 106th *section*, they are also required to deliver in upon oath a true statement in writing of all their receipts and payments at the meeting appointed by the commissioners to audit their accounts (3); upon which audit, the assignees are to be allowed to retain all such money as they shall have expended in suing out and prosecuting the commission, and other just allowances.

Costs of  
witness.

By *section* 35., where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the commissioners, such person may have such costs and charges as the commissioners shall think fit. And every witness, summoned to attend before the commissioners, shall have his necessary expenses tendered to him in like manner as is by law required, upon service of a *subpoena* to a witness in an action at law.

(1) See ante, 524.

(2) Ex parte *Whitchurch*, 1 Atk. 210.

(3) See ante, 526.

The statute thus makes a material difference between a witness, and a person suspected to have any of the bankrupt's estate in his possession; for the latter is bound to attend, although his expenses should not have been previously tendered to him (1); though if he be in reality without the means of taking the journey, that perhaps may be an excuse for not obeying the summons. (2) But it seems (as Lord Eldon observed upon one occasion) more consistent with justice, that the costs should be ascertained after the examination, rather than before it; for the result of the examination will afford a clearer view of what the party examined is entitled, in point of expense, to be reimbursed. As, if an adjournment of the meeting take place from time to time, it will then be impossible (without taking this into consideration) to ascertain correctly the expenses, *eundo, redeundo, et morando*. Or, if a person so to be examined had concealed the property of the bankrupt, — it would then be matter of regret, that the assignees had (as a condition precedent to his examination) been obliged to pay a sum of money to one, who had thus anticipated his own repayment. (3)

Distinction between the two cases.

Application of the rule.

Application of the rule.

When costs are ordered to a party so summoned before the commissioners, they may be recovered in an action of *assumpsit* against the assignees; and it is not necessary that the order for the costs should be in writing. (4)

When costs may be recovered in *assumpsit*.

When a witness, or other party summoned before the commissioners, is arrested, and applies to be discharged from the arrest, the costs of the application will, in general, depend upon whether a *contempt* was intended or not by the party arresting. If the arrest amounts to a contempt, they will be ordered to be paid by the officer or person causing the arrest; and in one case where the witness was arrested by the bankrupt, they were so ordered to be paid. (5)

Application of witness to be discharged from arrest.

1) *Ex parte Roscoe*, 2 Rose, 162. *Ex parte Benson*, *ibid.* 75. *Hyte v. Gresley*, 8 East, 319.  
2) *Ibid.*  
(3) 2 Rose, 348.; and see ante, 162.  
(4) *Yarker v. Botham*, 1 Esp. 64.  
(5) *Ex parte Byne*, 1 V. & B. 316.; and see ante, 161.

Costs of joint creditors as to conducting examinations.

The joint creditors under a separate commission are not entitled to have the expenses of a solicitor, employed by them to conduct examinations, &c. before the commissioners, paid out of the joint fund. (1)

### SECTION III.

#### *Of Costs on Petition.*

On petition to stay certificate.

It is a general rule, that if there has been no misconduct in the bankrupt, a *petition to stay a certificate*, when dismissed, is dismissed with costs to be paid by the creditor opposing the certificate. (2) But, when there are circumstances in the conduct of the bankrupt, which preclude him from any claim to the indulgence of the Court, the petition is then frequently dismissed without costs (3); and this notwithstanding he may be strictly entitled to his certificate.

On petition for supersedeas.

As to bankrupt's exemption from costs.

With respect to costs on a *petition for a supersedeas*:—Where a *bankrupt* petitions the Lord Chancellor to supersede his commission, and an issue is directed, though he fails upon the trial of the issue, he escapes the payment of costs; and the costs of the assignees are paid out of the estate; for the Court has, in general, no power to give costs against an uncertificated bankrupt. (4) The consequence of this exemption has been, however, that petitions of this kind have multiplied to the great oppression of creditors, and the waste of the bankrupt's effects; as the costs, even of the successful defence against such petitions, must fall upon the estate. Where the facts, therefore, are disputed upon

(1) *Ex parte Longman*, 1 Rose, 303.

(2) *Ex parte Warwick*, 14 Ves. 138. *Ex parte Bank of Scotland*, 1 Rose, 375. 1 V. & B. 5.

(3) *Ex parte Stracy*, 1 Rose, 67. *Ex parte Black*, *ibid.* note.

*Ex parte Nichols*, *ibid.* *Ex parte Ironet*, *ibid.* 351. *Ex parte Gardner*, 1 V. & B. 45. 1 Rose, 577. *Ex parte Stevens*, Buck, 389. *Ex parte Enderby*, 5 Mad. 76. *Ex parte Bryant*, 1 G. & J. 205.

(4) But see post, 855.

such a petition, and the bankrupt is in a situation to try the validity of the commission at law, the Court will (unless under special circumstances, where directions may be necessary to assist the trial,) leave him to his action at law; for if he fails in an *action*, he pays costs like any other plaintiff. (1) And where the bankrupt is really in a situation to try the validity of his commission at law, he will not be allowed the costs of a petition to supersede it; notwithstanding he has a verdict on an issue in his favour, and an order for a *supersedeas* is thereupon made; for he ought to have proceeded in the first instance at law, instead of presenting a petition to supersede. (2) Therefore, though the assignees will be directed to pay the costs of the trial, they will not be made to pay the costs of the petition; for it is their duty, as trustees for the creditors, to appear and resist any petition of the bankrupt to supersede the commission. (3) And where a commission is superseded merely for a defect in form as to the petitioning creditor, and there is no doubt as to the act of bankruptcy, &c., the costs of the *supersedeas only* will be allowed, though it would be otherwise if the act of bankruptcy had not been fully proved. (4)

*On petition for supersedeas.*

When not allowed costs of petition.

But, notwithstanding the Court has, in general, no power to give costs against a bankrupt while the commission is subsisting, — yet where on the petition of a creditor a commission is ordered to be superseded, on the ground of *concert* between the bankrupt and the petitioning creditor, the Court has, in such a case, ordered the costs of superseding it to be paid by the bankrupt and the petitioning creditor. (5)

When ordered to pay costs on the ground of concert.

If, upon the bankrupt's application, an order is made to supersede the commission, with costs to be paid by the

(1) *Ex parte Billiard*, Buck, 220.

(2) *Ex parte Marks*, 1 G. & J. 70.

(3) *Ex parte Edwards*, Buck, 232.

(4) *Ex parte Goodwin*, 1 Atk.

101.; and see *Ex parte Hylliard*, 1 Atk. 147.

(5) *Ex parte Green*, 1 G. & J. 188.

On petition  
for super-  
sedeas.

When pe-  
titioning  
creditor  
allowed  
costs.

petitioning creditor and the solicitor who sued it out, the bankrupt may proceed against both of them or either. (1)

When the petitioning creditor succeeds in resisting the bankrupt's application to supersede the commission, he will be allowed his costs of opposing the petition out of the bankrupt's estate as between attorney and client (2); and the like in the case of an assignee opposing the petition. (3)

But when the petition charges collusion, and the circumstances are suspicious, costs will not be given, though the petition fails. (4) And if the petitioning creditor does not succeed in resisting the application, he will then be directed to pay the costs of superseding the commission, and of the petition—as well as the costs of any proceeding at law or in equity in the matter—to the bankrupt, or the creditor who succeeds in superseding it. (5) For, though costs are not, in general, given to a party upon an appeal from the deliberate judgment of the commissioners, even though their judgment appears to be wrong (6), (except indeed in cases of fraud,)—yet the rule does not extend to *ex parte* cases, where the opposite side had not (as in the case of the adjudication of the bankruptcy) the opportunity of being heard before them, and the commissioners, therefore, were not in reality able to exercise a deliberate judgment. (7)

Separate  
commis-  
sion super-  
seded in  
favour of  
joint one.

Where a separate commission is superseded merely to give effect to a subsequent joint one, the petitioning creditor under the first commission (unless he has been acting *mala fide*) receives all the costs out of the joint estate, whether arising out of the first commission, the petition to supersede, or the *supersedeas*; and if he is a joint and separate creditor, he may elect whether he will be paid

(1) *Ex parte Bishop*, 8 Ves. 335.

(2) *Ex parte Bottomley*, 5 Mad. 91.

(3) *Ex parte Bryant*, 2 Rose, 1.

(4) *Ex parte Stevens*, 4 Mad. 256.

(5) *Ex parte Guleton*, 1 Atk. 139.

140. *Ex parte Heming*, Buck, 350.

(6) *Ex parte Allen*, 1 C. B. L. 2.

*Ex parte Moggridge*, *ibid*.

(7) *Ex parte Greenway*, Buck, 412.

such costs out of the joint, or separate estate. (1) But the costs of a commission superseded for non-prosecution will not be permitted to be paid out of the bankrupt's estate. (2)

*On petition for supersedeas.*

If a commission is taken out contrary to good faith, the party has a right to make a formal application to the Court to supersede it, with a view to be indemnified against any costs he may have incurred, by the commission being taken out and not proceeded in, — notwithstanding the commission would have been supersedable at the Bankrupt Office under the general order. (3)

*When commission taken out against good faith.*

Where a creditor states a case of fraud against the bankrupt which he fails in proving, the petition for superseding the commission will then always be dismissed with costs. (4)

*When allegation of fraud not proved.*

Where a commission was superseded with costs to be paid by the petitioning creditors — and one of them (who was a *feme sole*) married after the costs were taxed, — her husband was ordered to pay the taxed costs within a fortnight. (5)

*Where a feme sole a petitioning creditor.*

With respect to costs upon *other petitions* in bankruptcy, — it is a general rule, that if a petitioner do not in any petition pray his costs, he cannot have them awarded to him. (6) But costs, though not specifically prayed in a petition, may nevertheless be given under the word “*expenses*,” if expenses be prayed in it. (7) And where a petition is presented in a case, in which the Court has no jurisdiction, the respondent is always entitled to the costs of opposing it. (8)

*On petitions in general. Costs must be prayed.*

Costs are never given to a party upon a general petition any more than on a petition for a *supersedeas*) appealing from

*Petition against judgment*

(1) Ex parte *Brown*, 1 Rose, 33. Ex parte *Smith*, 1 G. & J. 56.

(4) Ex parte *Levi*, Buck. 75.

(5) Ex parte *Eagle*, Buck. 548.

(6) Ex parte *Atkinson*, Buck.

(2) Ex parte *Sanden*, 1 Rose, 87. 215.

Ex parte *Ellis*, 7 Ves. 135. Ex

(7) Ex parte *Hardenburgh*,

Ex parte *Leicester*. Ex parte *Layton*. 1 Rose, 204.

Ex parte *Hardwicke*, 6 Ves. 429.

(8) Ex parte *Allison*, 1 G. & J.

(3) Ex parte *Lowe*, 1 G. & J. 78. 210.

On petitions in general.

of commissioners.

the deliberate judgment of the commissioners (1), notwithstanding their determination appears to have been wrong, and the Court may have thought it necessary to direct an issue, or a trial at law. But where the determination of the commissioners is *ex parte*, and the person affected by their decision has no opportunity of being heard, we have already seen (2), that this rule does not prevail. And where an issue is directed by the Court, and the result of the trial is against the decision of the commissioners,—in this case, also, as in the case of a petition for a superseas (3), the costs of the issue are allowed (4), but not the costs of the petition. (5)

Costs of the day.

When a petition is ordered to stand over, the costs of the day will be ordered to be paid by the party occasioning the delay. (6) But they can only be obtained by a special order of the Court made at the time of adjourning the hearing of the petition. When an order is made for the payment of “the costs of and occasioned by the present application,”—such order includes the costs of an interlocutory order, which was made in pursuance of part of the prayer of the petition. (7)

Costs for default of appearance.

If a petitioner makes default in not appearing when the petition is called on, the respondent must produce an office copy of the affidavit of service before the rising of the Court, in order to be entitled to costs. (8)

Defective attestation.

Groundless imputations.

A petition, not properly attested by a solicitor pursuant to the general order (9), will be dismissed with costs. (10) And costs will also be given against a party, who makes groundless imputations in a petition, notwithstanding an order might have been made upon one part of the prayer of it. (11) Costs, also, as between attorney and

(1) *Ex parte Allen. Ex parte Moggridge*, 1 C. B. L. 2.

(2) Ante, 852.

(3) Ante, 851.

(4) 1 Mont. Dig. 141.

(5) *Ex parte Edwards*, Buck. J. 19. 232.

(6) *Ex parte Doncaster*, Buck. 463. 270.

(7) *Ex parte Green*, 1 G. & J. 188.

(8) *Ex parte Astell*, Buck. 296.

(9) August 12th 1809.

(10) *Ex parte Ransford*, 1 G. &

(11) *Ex parte Vernon*, 15 Ves.



client, will be given against a party, who makes an irrelevant or scandalous affidavit in support of a petition. (1) And a petition will in all cases be dismissed with costs, where the relief prayed is provided for by a general order. (2)

*On petitions in general.*

*Relief by general order.*

When the Master makes his report, after costs are referred to him to be taxed, and a petition is presented for leave to except to the report, the petitioner must pay the taxed costs into Court. (3)

*Exception to master's report.*

It is a general rule, that no court permits an appeal against an order for *costs only*. (4) Therefore a party cannot apply to correct an order (once signed and passed in respect of costs) by a separate petition as to the costs alone; but when the question is, not as to the personal payment of costs, but whether they shall be payable out of a particular fund, a petition for rehearing may then be presented for determining that question. (5)

*No appeal against order for costs only.*

Where several persons are directed to pay costs, the Court will not in bankruptcy determine the proportions, in which they ought to contribute amongst themselves. For the question of contribution is altogether collateral to the bankruptcy, and is the proper subject of an action at law, or a bill in equity for an apportionment. (6)

*Court will not order contribution.*

In general (as has been already stated (7)) costs cannot be given against an uncertificated bankrupt (8), notwithstanding he presents a petition which is dismissed even on the ground of its being multifarious (9), or unnecessary. (10) But in a case of fraud, misconduct, or vexation, the Court will subject him to costs — as, where he presented a third petition for the same purpose as two former, which

*Bankrupt liable to costs when guilty of fraud, &c.*

(1) *Ex parte Simpson*, 15 Ves.

76. *Anon.* 3 V. & B. 93.

(2) *Ex parte Watts*, 1 Rose, 436.

(3) *Ex parte Leigh*, 4 Mad. 394.

(4) *Ex parte Slack*, 1 C. B. L. 2.

(5) *Ex parte Baines*, 1 G. & J.

59.

(6) *Ex parte Wilmhurst*, 1 G. & J. 4. 244.

(7) *Ante*, 850.

(8) 1 C. B. L. 2. *Ex parte Wright*, 2 Ves. 11. *Ex parte Biddall*, Buck. 220.

(9) *Ex parte Coles*, Buck. 256.

(10) *Ex parte Parker*, *ibid.* 313.

On peti-  
tions in  
general.

had been dismissed, the Court made an order that he should pay the costs, and if he were unable to pay them, that he must be committed;—observing, that it was like the case of a pauper dispaupered for misconduct—and that if a bankrupt behaved ill, so he ought, in like manner, to lose his privilege. (1) So, likewise, in a case of fraud, costs will be given on a bill filed against an uncertificated bankrupt. (2) And though the Court has refused, upon dismissing a bankrupt's petition, to give the respondent costs out of the estate, the solicitor of the bankrupt was in one case ordered to pay 40s. costs to the respondent for presenting a petition, which was deemed by the Court to be wholly unnecessary. (3) When a bankrupt petitions for leave to surrender after the time for the surrender is expired, he in that case pays the costs of the application. (4)

Petition  
for leave  
to surren-  
der.

Petition  
to remove  
assignee.

Upon a petition to remove an assignee for the convenience of the estate, the assignee does not in such case pay the costs. (5) Nor is a removed assignee liable to the petitioning creditor for the payment of his bill of costs as taxed by the commissioners, unless there is collusion proved between the removed and the new assignee. (6)

By joint  
creditors.

Upon a petition by joint creditors to prove against the separate estate, no costs are given, where there are no joint effects nor solvent partner. (7)

Equitable  
mortgages.

When an equitable mortgagee petitions for a sale of the mortgaged premises, he is entitled to costs, if there is a written instrument specifying the agreement upon which his claim arises (8); notwithstanding parol evidence may be necessary to explain it. (9) But where there is a *ver-*

(1) *Ex parte Shaw*, 2 Ves. jun. 40.; and see *Ex parte Green*, 1 G. & J. 138.

(2) *Lock v. Bromley*, 3 Ves. jun. 40.

(3) *Buck*, 313.; and see post, "Solicitor."

(4) *Ex parte Carter*, 4 Mad. 394.

(5) *Anon.* 5 Mad. 76.

(6) *Ex parte Gibson*, 1 G. & J. 303.

(7) *Ex parte Bradshaw*, 1 G. & J. 99.

(8) *Ex parte Brighten*, 1 G. & J. 148. *Ex parte Sikes*, *ibid.* 549.; but see *Ex parte Horae*, 1 Mad. 622. 2 Mad. 231.

(9) *Ex parte Vauxhall Bridge Company*, 1 G. & J. 101.; and see *Ex parte Trew*, 3 Mad. 372.

*deposit* of the title deeds, without any written instrument to explain the purpose of the deposit, he in this case pays the costs of his petition. (1)

On petitions in general.

In one case, where costs were awarded upon a petition in bankruptcy, Lord Redesdale would not permit them to be made the subject of an action at law. (2)

Whether action lies for costs.

Upon a petition against *commissioners*, they will not be ordered to pay costs, unless in respect of conduct out of the course of their duty as commissioners (3); and when they are made parties to a petition without sufficient grounds, they will then be entitled to costs. (4)

Petition against commissioners.

#### SECTION IV.

##### *Of Costs in Actions and Suits by and against Assignees, and other Parties concerned in the Commission.*

Where an assignee is made a party to an action, or suit, for the purpose of sustaining a litigated commission, he is entitled to his costs out of the bankrupt's estate, as between attorney and client. For, as a bankrupt whenever he thinks fit can bring an action against his assignee, and it is the assignee's duty upon every occasion of this kind to sustain the interest of all the creditors as well as his own, it is highly reasonable, that he should be in all such cases completely indemnified; otherwise few persons would be prevailed on to accept the office of assignee. (5).

Assignee entitled to costs out of bankrupt's estate.

When notice has been given in an action by or against assignees to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy, — if the assignees prove the matter so disputed, or the other party admit the same on the trial, the judge is empowered by the new statute (6), if

When notice given to dispute the bankruptcy.

(1) *Ex parte Warry*, 19 Ves. 472. *Ex parte Garbutt*, 2 Rose, 78. ; and see ante, 202.

(2) *In re Dillon*, 1 Sch. & Lef. 110. *Dub. tam Lord Ellenborough Hartop v. Jukes*, 2 M. & S. 439.

(3) *Ex parte Searth*, 14 Ves. 104. 15 Ves. 293.

(4) *Ex parte Steele*, 16 Ves. 161.

(5) *Ex parte Bryant*, 2 Rose, 1.

(6) Section 90.

*In actions.* he thinks fit, to grant a certificate of such proof or admission, which will entitle the assignees to the costs occasioned by the notice, to be taxed by the proper officer, and added or deducted according as the verdict may be. But this provision of the statute will not entitle the assignees to costs, where they have been nonsuited. (1) A similar provision is also made as to suits in equity (2), when, if the assignees prove the matter so disputed, the Court (if it see fit) may order the party giving the notice to pay the taxed costs occasioned by it; and the service of the notice may be proved upon the hearing of the cause.

Assignees must pay costs of an action, though no assets.

Assignees, though suing in a representative capacity, are not within the exemption from costs given by the 23 Hen. 8. c. 15. to executors and administrators; nor will the Court, when the assignees are nonsuited upon the trial, suspend the payment of costs until they receive sufficient assets to pay them, notwithstanding they make an affidavit that they have no assets in hand. (3)

Bound by court of conscience act.

The 39. and 40. Geo. 3. c. 104., which deprives a plaintiff of costs where the sum recovered is less than 5*l*., has been held to extend to assignees; but where the defendant in such case had disputed the petitioning creditor's debt, the Court ordered the suggestion to be so entered, that the plaintiff might not be deprived of the costs thereby occasioned, but only of those costs which would have been incurred had no notice been given. (4)

When proceedings refused to be staid till payment of costs of former action.

Where an action was commenced by assignees under a former commission, which was superseded, and the assignees under a subsequent commission brought a fresh action—the Court, of King's Bench refused to stay proceedings until the costs of the former action were paid, though the cause of action was the same. (5)

(1) *Atkins v. Seward*, 1 B. & B. 275.

(2) *Section 91.*

(3) *Andrews v. Sealy*, 8 Pri. 212.

(4) *Ward v. Abrahams*, 1 B. & A. 367

(5) *Dawson v. Sampson*, 2 Chit.

Rep. 146.

When an action is brought against an assignee (or indeed against any other party) by the direction of the Lord Chancellor, it is a constant rule in the Court of Chancery, to make the defendant pay all costs, if he defeats the action by a formal objection, (1)

*In actions.*

When assignee defeats the action by a formal objection.

If assignees improperly resist a plaintiff's demand, and are brought before the Court by supplemental bill, they may be made liable to the costs of the whole suit; but where no application is made to them by the plaintiff before the filing of the bill, such costs will not in that case be given against them. (2)

When sued by supplemental bill.

By section 44. of the new statute it is provided, that if upon the trial of an action brought against any person for any thing done in pursuance of that statute, there shall be a verdict for the defendant — or, if the plaintiff shall be nonsuited, or discontinue his action or suit after appearance thereto — or if, upon demurrer, judgment shall be given against the plaintiff, — the defendant shall in either of these cases recover double costs. This right, however, to double costs will not entitle the party to receive twice the actual amount of single costs, but only the common costs, and one *half* of the common costs. (3) In like manner treble costs, where given by any statute, are composed of, first, the common costs; secondly, *half* of those costs; and lastly, *half* of the latter half.

Where double costs given.

When the commissioners have incurred any costs, in defending an action brought against them by any person for an act done by them in the strict discharge of their duty, they have a right to be compensated by the assignees, notwithstanding the assignees have in fact not received sufficient to pay the expenses of the commission. (4)

Commissioners entitled to compensation.

A bankrupt is personally liable for the costs of an action commenced by him, and proceeded in by the assignees in his name, notwithstanding he has obtained his certificate;

Bankrupt personally liable for costs.

(1) Per Lord Kenyon, *Wray v. Barwis*, Peake, 69.

(3) *Hullock*, 484.

(2) *Whitcomb v. Minchin*, 5 Mad. 234.

(4) *Ex parte Linthwaite*, 16 Ves.

~~SECRET~~

The Court has heard the evidence in this case, and it is the duty of the Court to render a verdict in accordance with the law and the facts. The evidence is clear and convincing, and the Court is satisfied that the defendant is guilty of the crime charged. The Court therefore renders a verdict of guilty, and sentences the defendant to the punishment provided by law.

Zankovye  
 are on  
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 15000 to  
 20000  
 25000

Where an action was brought against a bankrupt & executors after he had obtained his certificate, he was not entitled to costs though he recovered a verdict;—in the bankrupt statutes, the Court said, were to be construed in the same manner as the 23. H. 8. c. 15., and the 4. Jac. c. 3., which first gave a defendant costs upon obtaining a verdict; and those statutes are held not to apply to exec-

(1, Ex parte Seaman, 1 J. & G. 265).

(2) *Gravenor v. Cape, Say, Conts.*,  
245. 3d edit. Wils. 160. 2 Bl. 741.

(5) *Crosby v. Amey*, 8 Tinn  
407. 2 Moore, 400.

tors. (1) And where a bankrupt who was sued as executor, pleaded a false plea and a verdict was found against him — and the plaintiff obtained judgment for his costs *de bonis propriis*, — it was held, that though the bankrupt afterwards obtained his certificate, he was still liable to be taken in execution for the costs. (2)

*In actions:*

Where bankrupt sued as executor, pleads a false plea.

When a man brings an action *ex contractu* against a bankrupt, whether before or after a commission has issued, he takes the chance of losing his costs, in case the debt should be barred by the certificate; for the costs cannot in such a case be distinguished from the debt; and if the party be discharged from the one, he cannot remain liable to the other. Therefore, if a debt arise before, but a verdict is obtained and the costs taxed after, the bankruptcy of the defendant, (though previous to the allowance of the certificate) — the costs relate to and are considered as a part of the original debt, and the certificate extends to both. (3)

Costs follow the debt in action *ex contractu*.

## SECTION V.

### *When Security for Costs will be required.*

Where an uncertificated bankrupt sues as trustee for his assignees, and for their benefit, and not for the fruits of his own personal labour, he has been required to give security for costs (4); for, though it cannot be laid down as a general rule, that an uncertificated bankrupt must in all cases give such security where an action is brought by him; yet it is held to be but fair, if the action is really brought for

Of a bankrupt suing for benefit of his assignees.

(1) *Martin v. Norfolk*, 1 H. B. 528. This case was decided with reference to the 5 G. 2. c. 30. s. 7. which enacted, that the bankrupt, when he succeeded in an action brought against him after obtaining his certificate, should "recover his full costs." In the parallel section

(126) of the new statute, there is, however, nothing said about costs.

(2) *Howard v. Jemmet*, 3 Burr. 1368. 1 Bl. 400.

(3) *Ex parte Poucher*, 1 G. & J. 385. *Ex parte Parkinson*, *ibid.* 386. note (a), and see ante, 276. 596.

(4) *Webb v. Ward*, 7 T. R. 296.

Upon  
other pro-  
ceedings.

the benefit of the *assignees*, that *they* should be responsible for the costs. Accordingly, in one case of this kind, where the defendant obtained a verdict against the bankrupt, the Court of Common Pleas refused to grant the plaintiff a new trial, unless the assignees consented to be bound by the event of the action, and to be responsible for the costs. (1)

Where  
such secu-  
rity re-  
fused.

But where a joint action was brought by a bankrupt and another person (who was a prisoner in Newgate), the Court of Common Pleas refused in this case to require such security; though the judgment of the Court here seemed to proceed, upon the consideration of the circumstance of the *imprisonment* of one of the plaintiffs (2), rather than in respect of the bankruptcy of the other. And, indeed, a rule for security for costs will not in general be granted, merely on account of the *poverty or insolvency* of a plaintiff (3); for, where an uncertificated bankrupt brings an action for *his own benefit*—as to recover the produce of his earnings since the bankruptcy—such security will not be required. (4) So, where in a joint action it appeared, that one of the plaintiffs was a foreigner residing abroad, and the other a bankrupt in execution for debt,—the Court refused to require them to find security for the costs, one of the plaintiffs being within the jurisdiction of the Court, and within reach of its process, and not coming under any of the rules requiring such security to be given. (5)

Prelimi-  
nary pro-  
ceedings  
where de-  
fendant  
entitled to  
security.

Where a defendant is entitled to require security for costs, he should in the first instance, and before any motion is made to the Court upon the subject, apply for it to the plaintiff's attorney; for until the latter has *refused* to give it—although the Court may grant a rule to shew cause why the plaintiff should not find such security—they will not, at

(1) *Noble v. Adams*, 7 Taunt. 59.

(2) *Anon.* 2 Taunt. 61.

(3) *Goodright* dem. *Jones v. Thrustout*, Cas. Pr. C. P. 15. Willock, 443. *Field* q. t. v. *Carron*,

2 H. B. 27. Cowp. 24. 2 Dick. Ch. Cas. 765.

(4) *Cohen v. Bell*, B. R. T. 44 G. 3. 1 Tidd Pr. 468.

(5) *McConnell v. Johnson*, 1 East. 431.



any rate, make it a part of the rule, that the proceedings shall be in the mean time stayed; for the rule might otherwise be often obtained merely for the purpose of delay. (1)

*Upon  
other pro-  
ceedings.*

The defendant, also, must put in bail previous to his application for the rule. But where a foreigner resident abroad sued two defendants, and only one of them put in bail, that one was permitted to require the plaintiff to give security for costs, without putting in bail for the other defendant. (2)

The general rule is, that the application for security should be made, as soon as the defendant can reasonably do it after his knowledge of the fact, on which he founds his application. Therefore, where the defendant might have applied earlier, the motion was holden too late, after issue had been joined and notice of trial given. And a similar motion was also refused, where the defendant had obtained time to plead, and agreed to take short notice of trial,—the Court being of opinion, that he had thereby waived his opportunity of making the application, which must at that period necessarily delay the plaintiff. (3)

*Applica-  
tion for  
security  
should be  
made  
early.*

Where after action brought, and before plea pleaded, the plaintiff became bankrupt, and the defendant obtained an order for security for costs, and subsequently pleaded the plaintiff's bankruptcy in bar,—the Court held, that though they could not deprive the defendant of the benefit of that plea, yet as the order for security for costs would not have been made, if the defendant had said that he meant to defeat the action by pleading the plaintiff's bankruptcy, the order was discharged, with costs to be paid by the defendant. (4)

*Defendant  
cannot re-  
quire se-  
curity if  
he pleads  
the plain-  
tiff's bank-  
ruptcy.*

In Equity, an application for security for costs will be too late after answer, or obtaining an order for time to answer; at least, if the plaintiff's residence abroad, or any other cause

(1) *Cheap v. Popham*, 2 Smith's Rep. 661. 1 Tidd. 470.

(3) *Michel v. Pareski*, 2 H. B. 593.

(2) *De la Preuve v. Duc de Bi-  
ron*, 4 T. R. 697. *Carr v. Shaw*,  
5 T. R. 496.

(4) *Minchin v. Hart*, 1 Chitt. 215.

Upon  
other pro-  
ceedings.

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for the application appear on the face of the bill, or were known to the defendant at the time of filing the bill. (1) The usual security for costs required of a plaintiff in equity amounts to 40%.; and the Court will not, even under special circumstances, depart from the general rule in this respect. (2)

(1) 2 Ves. 24. 557. 1 Dick. Ch. jun. 596. 5 Ves. 261. 10 Ves. 257.;  
Cas. 147. 2 Brown, 609.; and see and see Hullock, 448.

14 Ves. 518. 3 Bro. 370. 1 Ves. (2) *Ogilvie v. Hearn*, 11 Ves.  
598.; and see 2 Ves. 557.

## CHAP. XXIII.

## OF THE SOLICITOR TO THE COMMISSION.

SECT. 1. *Of his General Rights and Duties.*2. *Of his Lien for Costs.*3. *Of the Taxation of his Bill, and his Remedy for Payment of it.*4. *Of Actions and other Proceedings by and against him.*5. *Of his Liability for Misconduct, and herein of his General Liability.*

## SECTION I.

*Of the General Rights and Duties of the Solicitor.*

THE solicitor to the commission is nominated by the majority of the assignees, and when so nominated is entitled to the custody of the proceedings under the commission. (1) He may also be removed by such majority, and in that case must deliver up the proceedings under the commission to any other solicitor who may be appointed in his room; for he has no lien upon them (as he has upon other papers) for his costs. (2) The solicitor is a minister of the Court (3), and is bound so far to watch over the interests of the bankrupt's estate, as to protect it even against his own demands—that is, where other parties have *preferable* claims upon it. Thus, in the case of a separate commission, it is his duty to attend to the interest of

How nominated.

(1) *Ex parte Watson*, 1 C. B. L. 25. *Ex parte Scarth*, 15 Ves, 293. *Ex parte Tomlinson*, 2 Rose, 66. (2) *Anon.* 2 Rose, 207. *Ex parte Scruby*, *ibid.* note (a). (3) 6 Ves. 1.

*Rights  
and du-  
ties.*

Disqualifi-  
cation.

Cannot  
take a  
bond or  
gift from  
his client  
during  
*pendency*  
of a suit.

the separate creditors, and not to permit the joint debt of himself and his partners to be proved to the prejudice of those creditors. (1) It is inconsistent with the duties, also, of the solicitor to the commission, to act as solicitor for the bankrupt (2); though it has been held to be no cause for superseding the commission, that he is also *assignee*. (3) He cannot, however, act as *banker* to the estate (4); nor can he be a *commissioner* under the same commission to which he acts as solicitor. (5) He is disqualified, also, from becoming a *purchaser* of any part of the bankrupt's property, even though the purchase is perfectly fair on his part, and he bids openly in the presence of different persons interested in the property. (6)

So — in order to prevent any abuse of the great power and influence which an attorney must generally possess over his client, and which might (if uncontrolled) enable a dishonourable practitioner to commit the grossest impositions — the Courts will never give effect to any bond or security, which is given or entered into by a client to his attorney during the *pendency* of the cause or proceeding in which the attorney is retained. In such a case the security will be either set aside entirely — or, at any rate, be restricted in its operation to the amount of such fees, as may be found due to the attorney upon a regular taxation of his bill. The principle of these decisions is the policy of the law founded upon the safety and convenience of mankind, and is quite independent of all fraud in the particular transaction, according to the ordinary understanding of the term. An attorney, therefore, is not permitted to take a

(1) *Ex parte Story*, Buck. 74.

(2) *Ex parte Ross*, 1 Rose, 263. *Ex parte Vaughan*, 14 Ves. 513.; and see 6 Ves. 631. note, where Lord Eldon observed, that he always thought what Lord Thurlow said was very wise, that there is no case in which it is useful upon general principles, that the same solicitor should be employed on all sides; for that, though it may be a saving of expense, yet where property

is to be brought to sale, to the creditors, &c. great mischief is occasioned by it.

(3) 16 Ves. 166.; but see 6 Ves. 4.

(4) 6 G. 4. c. 16. s. 102.

(5) *Ex parte Ward*, Sel. Ca. Ch. 46.

(6) *Owen v. Foulkes*, 6 Ves. 631 (note). *Ex parte James*, 8 Ves. 337. *Ex parte Linwood*. *Ex parte Churchill*, cited *ibid.* 345. *Ex parte Bennett*, 10 Ves. 581.

gift from his client while the relation subsists, though the transaction may be, not only free from fraud, but the most moral in its nature. (1) But after a suit is *entirely at an end*, a client may then give his attorney a reward for services over and above his legal fees. (2)

*Rights  
and du-  
ties.*

In suing out a commission against a bankrupt, the solicitor must be careful to observe the rules and regulations which have been at different times laid down by the Court for his conduct in this respect (3); otherwise, the commission will not only be superseded, but he himself will be made to pay the costs. By a general order of Lord Loughborough (4), it is provided, (as we have before seen (5)) that after the expiration of fourteen days from the date of a town commission, and twenty-eight days in the case of a country commission, the commission is supersedable for want of prosecution; and that the application for a new commission, which shall (in the course of the following day) be first made by any other attorney or solicitor than the one at whose instance the supersedable commission was issued, shall be preferred to an application for the same purpose by the attorney, who sued out such supersedable commission. But by a subsequent order (6), any solicitor, who acts merely as *agent* for the attorney in suing out the first commission, is not prevented from applying for a new commission as *agent* for a different attorney, provided he indorses upon the affidavit his own name, and the name and place of residence of the person for whom he acts as agent in suing out such second commission. And by the same order, whenever any attorney sues out a commission as *agent* for another, he is required to make a similar indorsement.

Rules to  
be observ-  
ed in issu-  
ing a com-  
mission.

An attorney or solicitor cannot, as has been formerly observed (7), be made a bankrupt himself in his profes-

Cannot be  
made  
bankrupt  
*quâ* attor-  
ney.

(1) 2 Atk. 298. Cas. temp. Talbot, 115. 2 Ves. 549. 4 Bro. 350. 2 Ves. jun. 199.; and see 7 Ves. 584. 3 Anstr. 769.

(2) 2 Ves. 260. 2 At. 30.

(3) See ante, Ch. V. Sect. 1.

(4) 26th June, 1793.

(5) Ante, p. 120.

(6) 5th November, 1793.

(7) Ante, p. 23.

*Rights  
and du-  
ties.*

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As to the  
produc-  
tion of  
the pro-  
ceedings.

sional capacity; though he is liable (like any other person) to a commission of bankruptcy, if he acts in the character of a *scrivener*, or follows any other calling which the bankrupt law has denominated a trading.

The solicitor to the commission is, in general, the depository of the commission and the proceedings; and he is bound to keep them in safe custody, until required by the assignees, or an order of the Lord Chancellor, to deliver them up to any other person; for (we have already seen (1)) he has no lien upon them, and if he refuses to produce them when legally required, costs will always be given against him. (2) But it seems, that he has a lien upon the proceedings under a commission which has been *superseded*, and cannot be compelled to deliver them up until his costs are paid. (3) If he is served with a *subpoena duces tecum* to produce the proceedings in a collateral action, the better opinion seems to be that he is bound to do so (4), and that this is an obligation incumbent upon him as a public duty (5); though Lord Kenyon in one case held the contrary, saying that the proceedings belonged not to the solicitor but to the assignees. (6) Conflicting opinions have, also, been expressed by different judges upon his liability to produce them when the production *might tend to the detriment of his clients the assignees* — Lord Chief Justice Abbott holding, that he was not compelled to do so (7) — whilst Lord Gifford, on the contrary, decided on one occasion that he was bound to produce certain books of the bankrupt, in order that entries relating to the matters in issue, but to them alone, might be read upon the trial — notwithstanding there was in this case a possibility of the assignees being prejudiced by the

(1) Ante, p. 865.

(2) Ex parte *Bullen*, 1 Rose, 134.  
Ex parte *Hardy*, *ibid.* 395. Ex  
parte *Tilley*, 2 Rose, 83.; and see  
Ex parte *Sandison*, 1 Rose, 275.

(3) Ex parte *Shaw*, 1 G. & J.  
124.

(4) *Cohen v. Templar*, 2 Str.  
260. per Holroyd J.

(5) *Pearson v. Fletcher*, 5 Esp.  
90. per Lord Ellenborough.

(6) *Bateson v. Hartsink*, 4 Esp.  
43.

(7) *Laing v. Barclay*. 3 Str. 55.

result of the verdict. (1) The solicitor, however, ought at all events (when served with a *subpœna duces tecum*) to be ready to produce the proceedings, if ordered to do so by the Court—though it seems a question for the judge, whether he ought to be compelled;—for in case of disobedience without special cause, he will be liable to an attachment, or an action for damages. (2)

*Rights  
and du-  
ties.*

With respect to other papers and documents deposited by a bankrupt with his solicitor, and which do not form any part of the proceedings under the commission—it has been held, that a solicitor is bound to produce such papers (for the purposes for which he received them) on behalf of the assignees, though he is not employed by them in the cause; but he is not bound to deliver them up, or even to produce them in *any other business*, without payment of his bill. (3) And where a solicitor has *no lien* on such papers deposited with him by a bankrupt, the Lord Chancellor will, on petition, order them to be delivered up to the assignees (if necessary) for the administration of the estate; though such an application was refused, where the assignees wanted them for the purpose of instituting criminal proceedings against the bankrupt. (4) A solicitor, also, who is not the bankrupt's solicitor, but who has in his custody a deed executed by the bankrupt, is bound to produce it if required by the commissioners, like any other witness upon a *subpœna duces tecum*—without prejudice, however, to any legal objection he may have to disclose circumstances relating to the deed, on the ground of confidential communication. (5)

*As to pro-  
duction of  
other pa-  
pers depo-  
sited by  
bankrupt.*

An attorney is, in general, privileged from arrest by process issuing out of *his own Court*;—and if arrested, may move to be discharged on common bail. (6) But if

(1) *Hawkins v. Howard*, 1 Ryan  
: M. 64.; and see *Corsen v. Du-*  
*ois*, 1 Holt, 239.; and ante, p. 790.

(2) 1 Holt, 239. 1 Phill. 471.

(3) *Ross v. Laughton*, 1 Ves. &  
: 349.

(4) *Ex parte Innes*, Buck, 337.

(5) *Ex parte Treacher*, Buck,  
17.; and see 1 Holt's Rep. 239.

(6) 1 Mod. 10. 2 Salk. 544.

1 Wils. 298.

*Rights  
and du-  
ties.*

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When  
privileged  
from ar-  
rest.

When ex-  
pected to  
explain  
his con-  
duct.

Cannot  
execute  
the bond  
to the  
Chancel-  
lor for an  
infant.

Must pay  
commis-  
sioners'  
fees.

When  
liable to  
the mes-  
senger.

he is arrested by process out of a *different* Court, he must then find special bail, and plead his privilege in abatement. (1) And where a solicitor was arrested by a *clerk in Court*, and applied to the Lord Chancellor for an injunction to stay the proceedings, and for an order that the bail-bond should be cancelled, — Lord Eldon said, that by granting such a motion, he should take away the authority and privileges of the ancient officers of the Court. (2) But a solicitor, as well in bankruptcy as in the course of other judicial proceedings, is privileged from arrest in going to or returning from the Court to which his duty to his client calls him; therefore, where a solicitor was arrested on his way to Lincoln's Inn Hall to attend the hearing of a petition in the Lord Chancellor's paper, he was ordered to be (3) discharged on motion — Lord Eldon upon this occasion examining the party himself, and the oath being administered by the registrar.

When a commission is suspicious in the circumstances of the issuing of it, the Lord Chancellor will expect the solicitor to give an account of his conduct, and to explain those circumstances. (4)

As no person but the petitioning creditor himself can enter into the bond to the Lord Chancellor upon issuing the commission, a solicitor was therefore refused permission to give the bond for a petitioning creditor who was an *infant*. (5)

The solicitor is bound to pay the fees of the commissioners if they are summoned to attend, whether there be assets sufficient for that purpose or not; and if he refuse, the commissioners may petition against him. (6) So, he is liable to the messenger for his costs, and for any damages sustained by him when the commission is superseded for

(1) 2 Salk. 544. 2 Str. 864.  
2 Ld. R. 1567. 1 Wils. 306.

(2) *Smith v. Wainwright*, Sitting  
after Michaelmas term, 1826.

(3) *Castle's case*, 16 Ves. 412.  
The application in such a case  
must be entitled *in the bankruptcy*.

(4) *Ex parte Stevens*, 6 Ves. 1.  
19 Ves. 539.

(5) *Ex parte Barrow*, 5 Ves. 554.

(6) *Ex parte Griffith*, 2 Rose.  
342. 1 Mad. 56.



fraud, and the petitioning creditor has absconded. (1) In like manner, where the solicitor was employed by the petitioning creditor to work the commission for a sum certain, and had received a great part of that sum, he was held liable to the payment of the messenger's bill. (2) But, in general, the solicitor is not to be regarded as a principal, though he is the *medium* through which it is convenient that the messenger should receive his fees (3); for the petitioning creditor, and not the solicitor, is liable to the messenger in the first instance, unless the solicitor has made himself responsible by special agreement. (4)

*Rights  
and du-  
ties.*

The solicitor, employed to present a petition to stay the bankrupt's certificate, ought not to withdraw it without leave of the Court. (5)

Neither of the parties in an *action at law* can change his *attorney* without leave of the Court, or the order of a Judge for that purpose; and such leave will not be granted until the party applying for it has actually paid, or undertaken to pay, the attorney's bill as taxed by the proper officer. (6) But a party may change his *solicitor* in the Court of Chancery without a previous order of Court. The solicitor will, however, in such case have a lien for his costs upon the papers in his possession, though he cannot (except by retaining such papers) prevent the progress of the cause till he be satisfied. (7)

*Attorney  
in a cause  
cannot be  
changed  
without  
leave of  
the Court.*

## SECTION II.

### *Of his Lien for Costs.*

Though an attorney or solicitor has not, as we have already seen (8), any lien upon the commission or the pro-

*On what  
his lien  
attaches.*

(1) *Ex parte Hartop*, 9 Ves. 109. 2 Bl. 1323. Doug. 217.; and see 12 Ves. 349. 2 Ves. 162. *Langley v. Stapleton*,

(2) *Hartop v. Jukes*, 2 M. & S. 438. 1 Barnes, 35. 13 Ves. 196.

(3) 2 M. & S. 438.

(4) *Hart v. White*, 1 Holt, 376. *ibid.* 195.; and see 1 Sch. & Lef. 315. 2 Ves. 112. 3 Atk. 727. 14 Ves.

(5) *Ex parte Gibson*, 6 Ves. 5. 272.

(6) 7 Mod. 50. Say. Rep. 218. (8) *Ante*, 865. 868.

Lien.

ceedings under it (whilst the commission is in existence) for his costs, yet he has a general lien upon all *other* deeds and papers of the bankrupt, which came into his hands *before* the bankruptcy — but not for those received *after* the bankruptcy; — and he has the same lien, also, against the assignees as against the bankrupt. (1) This lien is held to attach, not only in respect of his bill for business done before his bankruptcy, but for the costs of an action brought by him against the bankrupt (even subsequently to the issuing of the commission) in order to recover the amount of his bill. (2) And if the attorney dies, his lien is not extinguished, but goes to his personal representative; for the Court will not order his executor to deliver up the deeds or papers, until security has been given that his lien will be discharged. (3)

Goes to  
personal  
representative.

How far  
lien on  
proceedings in a  
suit extends.

But the lien of an attorney (on papers and proceedings in an action or suit in which his client is concerned) only extends to the amount of his costs and charges in that particular action or suit, and not to any demand he may have against his client in respect of *other* actions or suits. (4) And if papers are deposited with an attorney for a particular purpose, then they are exonerated from his general lien; but the purpose of the deposit must appear by special agreement. (5)

Lien of an  
agent upon  
papers.

So, the *agent* of a country attorney (who becomes bankrupt) has a lien upon papers in his hands for the amount of his agency fees, — which lien, it seems, is not defeated by his proving his debt under the commission. (6) He has not, however, a *general* lien upon the papers in a cause, but only a special lien for the amount of money actually due to him

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| (1) <i>Mitchell v. Oldfield</i> , 4 T. R. 123. <i>Ex parte Bush</i> , 7 Vin. Ab. 74. <i>Ex parte Bell</i> , 1 C. B. L. 429. <i>Ex parte Pemberton</i> , 18 Ves. 282. <i>Stevenson v. Blakelock</i> , 1 M. & S. 535. <i>Ex parte Lee</i> , 2 Ves. jun. 285. <i>Park v. Carter</i> , 1 C. B. L. 285. | (2) <i>Lambert v. Buckmaster</i> , 2 B. & C. 616.                         |
|  | (3) <i>Redfearn v. Sowerby</i> , 1 Swanst. 84. 1 Wils. 96.                |
|  | (4) <i>Lawn v. Church</i> , 4 Mad. 391. <i>Bray v. Hine</i> , 6 Pri. 203. |
|  | (5) <i>Ex parte Stirling</i> , 16 Ves. 258.                               |
|  | (6) <i>Ex parte Steele</i> , 16 Ves. 164.                                 |

from the country attorney for business done in that *particular cause*, and—as against the client or party in the cause—not beyond the extent also of the balance due from the client to the country attorney. (1)

If the attorney take any security for payment of his bill, such as a bond or promissory note—or enter into any *special* contract or agreement for the payment of it,—his lien, in either of these cases, is held to be abandoned (2); for it is a maxim adopted from the civil law, that a party entitled to a lien, by taking security for his demand, waives that right—the *special* contract in this instance superseding the *implied* one. And where a solicitor had obtained an order to have his bill taxed, and to prove for the amount, he was held by the Vice-Chancellor to have waived his lien upon papers belonging to the bankrupt. (3) But where an attorney had taken acceptances for the amount of his balance *before* a lease came to his hands, and some of which acceptances had also before then been dishonoured, and one taken up by himself,—the Court of King's Bench distinguished this case from that of *Cowell v. Simpson*, and held that his lien was not extinguished. (4)

The lien of an attorney, on deeds and papers in his possession, is confined to the deeds strictly belonging to his client—except, indeed, those which he has himself prepared. (5) Therefore, if a tenant for life put the deeds of the life estate into his attorney's hands, and dies,—the attorney has no lien upon them as against the remainderman. (6)

So, where deeds not prepared by an attorney come by accident into his hands (even through the medium of his own client), the attorney has not a lien upon them, as

(1) *Bray v. Hine*, 6 Pri. 203. but see *Ex parte Steele*, 16 Ves. 164. *Ex parte Hunter*, Buck, 556.  
Anon. 2 Dick. 802. 15 Ves. 297.  
*Chapman v. Clarke*, *ibid.* *Farewell v. Coker*, 2 P. Wms. 460. (4) *Stevenson v. Blakelock*, 1 M. & S. 535.

(2) *Cowell v. Simpson*, 16 Ves. 275.; and see 1 Turn. 91. per Lord Eldon. (5) *Hollis v. Claridge*, 4 Taunt. 807.

(3) *Ex parte Hornby*, Buck, 351.; (6) *Ex parte Nesbitt*, 2 Sch. & Lef. 279.; and see *Hoare v. Parker*, 2 T. R. 376. *Bishop v. Huggins*, 2 Barnes, 38.

Lien.

What a waiver of lien.

Extent of the lien on deeds and papers.

No lien against third person in deeds not prepared by him;

**Lien.**

nor on a will, nor as steward of a manor;

on money recovered in an action;

on an estate recovered.

Money in hands of the sheriff.

Money awarded by an arbitrator.

against the other party to the deeds, for the amount of his demand against his client. (1) Neither has an attorney any lien upon the *will* of his client (2), nor upon documents, which he obtained possession of, not in his character of attorney, but in that of steward of a manor. (3)

The lien of an attorney attaches upon *money* in his hands belonging to his client, as well as to deeds and papers. Therefore, if money be recovered in an action, he may stop it *in transitu*, or apply to the Court to prevent its being paid over until his own demand is satisfied (4)—upon the principle (as Lord Kenyon formerly observed) that the party should not run away with the fruits of the cause, without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained. (5) Therefore, if a defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt and costs. (6) So, if a solicitor prosecute to a decree, he has a lien on an estate recovered, as against the person recovering, for his bill; but not as against the estate in the hands of the *heir*, unless it should be necessary to have the suit revived; and, in that case, the lien will revive too. (7) An attorney has also a lien for his bill upon money levied under an execution upon a judgment recovered against his client; and, on motion, the Court will grant a rule upon the sheriff to pay it over to him, notwithstanding a docket has been struck against the plaintiff on an act of bankruptcy since the judgment. (8) So, an attorney has a lien upon a sum *awarded* in favour of his client (9), as well as if it was recovered by judgment.

(1) *Esdaile v. Oxenham*, 3 B. & C. 225.

(2) *Georges v. Georges*, 18 Ves. 294. *Belch v. Symes*, 1 Turn. 87.

(3) *Champernoun v. Scott*, 6 Mad. 93.

(4) Tidd's Prac. 329. Barnes, 145.

(5) *Read v. Dupper*, 6 T.R. 361. 1 Taunt. 341.

(6) 6 T.R. 361.

(7) Ambl. 102.

(8) *Griffin v. Eyles*, 1 H.B. 122

(9) *Ormerod v. Tate*, 1 East, 464. and see *Gifford v. Gifford*, Forest's Rep. 109.

Where costs were ordered to be paid by a petitioning creditor to a bankrupt upon the commission being superseded, the bankrupt's solicitor was held to have a lien upon the costs for the expense of superseding the commission (1) ; and, indeed, where any costs are ordered to be paid to a party to a petition, the solicitor of the party has a lien upon those costs for his own charges, although there be no fund in Court to pay them ; neither can the client, in such a case, release the benefit of the order to the prejudice of the solicitor. (2) But it has been determined, that his lien on a *fund decreed* to his client is (like his lien upon papers in a cause) not a *general lien* ; and that he can only claim to be reimbursed out of such fund the costs in *that particular suit*, and not his demand for costs incurred in other suits. (3)

**Lien.**

Costs ordered to be paid.

So an *agent* in London for a country attorney has only a lien on the damages and costs recovered in an action, to the amount of what is due to him *as agent* in the particular cause, and not to the extent of what would have been the amount of the country attorney's costs. (4)

Agent's -  
lien on  
damages  
and costs.

Where a solicitor, however, declines to act any further for a client, on the ground of the refusal of the latter to follow his advice, he has, in this case, no lien for his costs upon a *fund in Court* ; for whatever may be his reasons for declining to proceed, a solicitor can only claim a lien on a fund of this description, when he carries the business through to a hearing. (5)

When  
solicitor  
declines  
to act.

In deducting or setting off the costs, or the damages and costs, in one action against those in another, there is some difference in the practice of the courts as to the recognition of the lien of the attorney. In the Common Pleas it is olden, that the lien of the attorney is subject to, and

Lien in  
setting off  
costs in  
different  
actions.(1) *Ex parte Castle*, 15 Ves. 539.(2) *Ex parte Rhodes*, 15 Ves. 542.*Ex parte Bryant*, 2 Rose, 237. Ves. 25.(3) *Laun v. Church*, 4 Mad. 391.(4) *White v. Royal Exchange Assurance*, 1 Bing. 20. *Ward v. Kepple*, 15 Ves. 297. *Moody v. Spencer*, 2 Dow. & R. 6.(5) *Cresswell v. Byron*, 14 Ves. 271.

*Lien.*

therefore ought not to be permitted to interfere with, any equitable arrangement that may be directed between the parties in the suit. (1) Lord Eldon, it seems, when Chief Justice of the Common Pleas, did not approve of this practice, — saying, that in the Court of Chancery he never knew the idea entertained of arranging the funds, till the respective attornies were paid their costs (2); though afterwards, it appears, he must have altered his opinion in this respect, since it has been subsequently decided by him in equity, that costs are arranged according to the equities of the parties, and that the solicitor's lien is only upon the *balance* under that arrangement. (3) The practice, however, of the *Common Pleas* in this particular, has been since supported by subsequent cases in the same Court, by which the right of set-off between the parties is preferred to the lien of the attorney. (4) In the King's Bench this right of set-off is not permitted until the bill of the attorney has been discharged; that Court considering, that an attorney has a lien for his fees in the cause upon the costs and damages recovered — and that such a set-off therefore, cannot be enforced adversely to his lien. (5) And this practice appears to accord also with that in the Exchequer (6); where it has been holden that a plaintiff, by settling the action without the knowledge of his attorney, does not deprive the attorney of his lien for costs, but that he may nevertheless go on to judgment and take out execution for nominal damages and costs. (7) But where the defendant, *not having had notice* to the contrary, compromised the debt and costs with the plaintiff before his attorney had been paid, the Court of King's Bench would

(1) *Schoole v. Noble*, 1 H. B. 23. *Nunex v. Modigliani*, *ibid.* 217.; and see *Hullock*, 472. and the cases there cited.

(2) *Hall v. Ody*, 2 B. & P. 28.

(3) 15 Ves. 75. 79. *Ex parte Rhodes*, 15 Ves. 541, 542.

(4) *Emden v. Darley*, 1 New. Rep. 22. *Brown v. Sayer*, 4 Taunt. 320.; and see 2 N. R. 102.

(5) *Middleton v. Hill*, 1 M. & S. 240. *Mitchell v. Oldfield*, 4 T. R. 123. *Randall v. Fuller*, 6 T. R. 456. *Morland v. Rashleigh*, 2 H. B. 441. note. *Glaister v. Hewer*, 8 T. R. 69.

(6) *Smith v. Brocklesby*, 1 Ans. 61. *Gabboot v. Chaytor*, *ibid.* 279.

(7) *Cole v. Bennett*, 6 Pri. 15.

not oblige the defendant to pay the plaintiff's attorney the amount of his costs. (1) Lien.

With respect to *interlocutory* costs, even in the King's Bench, the attorney's lien is there held only to attach upon the balance of the costs accruing in the same cause, which are *ultimately* to be paid over to the one or the other party in the cause; and that the cause is not to be split, so as to give the attorney of either party a lien upon such interlocutory costs, when his client might finally be bound to pay costs to a greater amount to the adverse party. (2) Interlocutory costs.

And the lien of the attorney for his costs is held in no case to interfere with the personal liberty of the other party to the suit, nor to extend to a lien on the defendant's body (3); as, where a plaintiff after judgment settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record, the defendant was considered entitled to be discharged out of custody, though the lien of the plaintiff's attorney for his costs had not been satisfied. (4) No lien on defendant's body;

Whenever an attorney calls on the Court to interfere summarily against a party, who has deprived him of his costs by entering satisfaction on record, he must make it distinctly appear, that every thing on *his part* has been rightly done. If he has not, therefore, a regular authority from the plaintiff for the commencement of an action, the Court will not interfere in his behalf, by ordering the entry of satisfaction to be vacated. (5) nor without a regular authority.

### SECTION III.

*Of the Taxation of the Solicitor's Bill of Costs, and his remedy for the Payment of it.*

It has been before observed, that the costs of prosecuting the commission up to the choice of assignees are How costs are to be taxed.

1) Doug. 238.

2) *Howell v. Harding*, 8 East, (4) *Marr v. Smith*, 4 B. & A. 466.

3) *Pyne v. Erle*, 8 T. R. 407. (5) *Abbott v. Rice*, 3 Bing. 154.

4) *Martin v. Francis*, 2 B. & A. 402.

*Taxation  
of bill.*

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to be taxed and ascertained by the commissioners at the meeting for that purpose; and that if any party is dissatisfied with their taxation, the bill may, upon application to the Chancellor, and reasonable objection shewn, be referred to a Master to be taxed (1)—and this even though the amount of the bill has been allowed in the accounts of the assignees. (2) The new enactment (3) has been also noticed, by which all subsequent costs are now made taxable by the commissioners in the first instance, with the same reservation of the right of any party to refer the taxation afterwards to a Master. (4)

Where no  
commis-  
sion sub-  
sisting.

Some doubts were formerly entertained, whether the Lord Chancellor can order the taxation of a bill in bankruptcy, where there is no commission subsisting—as in a case, where the application is made to tax a bill after the commission is superseded. (5) But it seems, that the general jurisdiction of the Lord Chancellor over solicitors, as officers of the Court, will give him sufficient authority to make any order that he thinks fit respecting the taxation of a solicitor's bill. (6) And where a docket has been struck, though no commission is sealed, the Lord Chancellor has, upon petition, referred the bill to be taxed. (7)

Where, of  
course, to  
order tax-  
ation.

Where charges in a solicitor's bill up to the choice of assignees are *prima facie* exorbitant, it is of course to refer it to a Master to tax,—notwithstanding it may have been paid, and the assignee may be dead who paid it. (8) The order for taxing such a bill may be drawn up, even upon an *ex parte* application, and if the solicitor wishes to modify or discharge the order, he must apply to the Court for that purpose. (9) Any creditor, also, may apply for the order, if there has been neglect on the part of the assignees, but not otherwise. (10)

(1) Ante, p. 845.

(2) Ex parte *Gregson*, 3 Mad.

49.

(3) Section 14.

(4) Ante, p. 847.

(5) Ex parte *Parker*, 1 C. B. L.

12. Ex parte *Aldridge*, *ibid.*

(6) Ex parte *Earl of Uxbridge*,

6 Ves. 425. Ex parte *Arrowood*,

18 Ves. 124.

(7) Ex parte *Smith*, 5 Ves. 706.

(8) Ex parte *Neale*, Buck, 111.

Ex parte *Emery*, *ibid.* 422.

(9) Ex parte *Hewitt*, Buck, 388.

(10) Ex parte *Walker*, 1 G. & J.

95.



In case of a deficiency of assets, the petitioning creditor (we have seen) and not the assignees, is personally liable to the solicitor for his bill up to the choice of assignees (1); though his remedy to enforce the payment of it seems rather to be by an action at law than by petition to the Chancellor. (2)

*Taxation  
of bill.*

Who  
liable to  
solicitor  
when no  
assets.

Where the solicitor (employed by the petitioning creditor to sue out the commission) is continued by the assignees, and, having delivered his bill including all charges both before and after the choice, receives a certain sum on account of his bill generally from the assignees, he is bound to appropriate it (in his account with the petitioning creditor) in reduction of his claims upon him for his costs before the choice of assignees. (3) Where the amount of such costs, therefore, is covered by the sum so received, it cannot be set off by the solicitor against a debt due from him to the petitioning creditor on his own account.

How  
bound to  
appropri-  
ate a gene-  
ral pay-  
ment.

A solicitor having persuaded a petitioning creditor to strike a docket, upon the solicitor undertaking to prove the act of bankruptcy, and guarantee the petitioning creditor from the expenses of issuing the commission, an order was refused for taxing the solicitor's bill; for both he and the petitioning creditor were, in this case, considered to be guilty of a contempt of the Great Seal. (4)

When or-  
der refused  
to tax bill.

Where a solicitor carries on suits in equity for an assignee, without the authority of the majority in value of the bankrupt's creditors present at a meeting summoned for that purpose, he has no claim against the estate of the bankrupt for his bill in respect of such suits, though he has a personal remedy against the assignee who employed

When the  
bank-  
rupt's  
estate not  
liable to  
solicitor.

1) *Ex parte Haynes*, 1 G. & J.

(3) *Philips v. Dicus*, 15 East, 248.

2) See ante, p. 846.

(4) *Ex parte Wilson*, Buck, 306.

Taxation  
of bill.

him. (1) And the Court will not countenance the employment of more than *one* solicitor under the commission, so as to increase the charge to the bankrupt's estate. Therefore, where a solicitor (who was not the solicitor to the commission) was employed by joint creditors under a separate commission, to conduct examinations, &c. before the commissioners, the Lord Chancellor refused to make any order for the payment of his charge out of the joint effects. (2)

Where  
solicitor  
sues out a  
commis-  
sion on his  
bill.

Where a solicitor takes out a commission against a bankrupt upon a debt due to himself for costs, any order in this case may have the bill of costs taxed, if the bankrupt himself at the time of his bankruptcy was not excluded. (3)

As to costs  
incurred  
subsequent  
to the  
bank-  
ruptcy.

A solicitor, who has been engaged in carrying on legal proceedings for the bankrupt, cannot charge his estate with the costs incurred subsequent to the commission of the act of bankruptcy. A debt, therefore, composed of such costs is not a good petitioning creditor's debt. (4)

Bill cannot  
be taxed  
upon the  
trial, or  
after a  
judgment  
recovered  
on it;

With respect to other matters, not occurring in bankruptcy, it is a matter of course to order the bill of an attorney or solicitor to be taxed (under the provisions of the 2 G. 2. c. 23.) before a judgment is obtained against the party to be charged with it; which order must be *personally* served upon the solicitor, unless a special order is obtained to dispense with such service. But it is a settled point, that the bill cannot be *taxed* at the *trial* of an action brought upon it, or *after verdict*; for the officer of the Court is considered to be the best judge of the reasonableness of the charges, the Court itself) during the progress of a trial) being quite incompetent to determine satisfactorily upon the different *items*. Therefore, if a party, who may have the bill previously taxed, waive that ad-

(1) Ex parte *Whitchurch*, 1 Atk. 210.

(2) Ex parte *Longman*, 1 Rose, 303.

(3) Ex parte *Prideaux*, 1 G. & J. 28.

(4) Ex parte *Miller*, Beck, 226.

vantage, and let the cause go to a jury, either by pleading, or on a judgment by default, he cannot afterwards resort to the taxation by the officer of the Court.

*Taxation  
of bill.*

Where, also, an account has been *settled* between an attorney and his client, the Court will not, in general, refer a bill for taxation, unless error, fraud, or other circumstances be disclosed by affidavit (1); in which case, neither payment, nor a release, nor a judgment for the money due, will preclude the Court from having the bill taxed. (2) But where a bond was given for the amount of an attorney's bill five years before, and all the vouchers were delivered up (3) — or where a bill has been settled and paid several years, and a receipt in full given (4), — the Court, in each of these cases (there being no evidence of fraud) refused to refer the bill to be taxed. Where, however, the circumstances are suspicious, and the client has inadvertently given a bond or mortgage to secure the payment of what was charged to be due to him on account of fees, &c., courts of equity have in some cases relieved the client, and ordered the bill to be taxed (5); and this even after the lapse of a considerable number of years. (6) So the settlement of a solicitor's bill pending a cause is not, as between other persons, conclusive; for while the suit is pending, the client is in a degree under the control of the solicitor; and such a settlement does not therefore bar a taxation. (7)

nor after  
an account  
is settled.

If the *whole* of an attorney's bill be for *conveyancing* business, it cannot be taxed (8); but if the bill be in *part* for business done in court, and the rest for business of an-

What  
items tax-  
able.

(1) *Hooper v. Till*, Doug. 198.  
*Clarke v. Taylor*, Cas. Pr. C. P.  
18. Prac. Reg. 38. Barnes, 124.  
*Longstaffe v. Taylor*, 14 Ves. 262.  
*Bennet v. Hart*, Say. 323. *Dra-*  
*wer's Company v. Davis*, 2 Atk. 295.  
Mullock, 501. et seq.

(2) Say, 323. Doug. 199.; and  
see 2 Atk. 295.

(3) *March v. Carter*, Cas. Prac.  
C. P. 109. Prac. Reg. 37.

(4) *Pistor v. Dunbar*, 1 Anstr.  
186.

(5) Per Lord Hardwicke, 2 Atk.  
29, 30. Per Lord Camden, 1 Dick.  
403. 14 Ves. 263.; and see ante,  
727.

(6) *Lewes v. Morgan*, 5 Pri. 42.

(7) *Crossley v. Parker*, 1 Jac. &  
W. 460.; and see ante, 866.

(8) *Hillier v. James*, Barnes, 41.  
B. N. P. 145.

*Taxation  
of bill.*

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other nature, the whole bill then is liable to taxation (1), even though the *smallest item* be for business done in court. (2) Charges, also, for holding the courts of a manor by an attorney, as the steward of the Court, are charges for business connected with his professional character; (like those for conveyancing,) and are, therefore, taxable when found in a bill containing other taxable items. (3) And whenever an action is commenced in any court upon an attorney's bill, that court (being thereby possessed of the cause) has a power to refer such bill for taxation, although no one item in it is for business transacted in that particular court. (4) So, from what the Court of King's Bench has intimated in a recent decision (5), it seems, that any court has a paramount jurisdiction, independent of the 2 G. 2. c. 28., to refer the bill of any attorney or solicitor of that particular court to be taxed.

If an attorney deliver two separate bills together, one of which is for fees and disbursements in causes, and the other for conveyancing, the Court in such a case has ordered both bills to be taxed. (6) A bill, also, for business done *entirely* at the quarter sessions (7), or in a criminal suit in the Court of Great Sessions in Wales (8), will, upon application, be referred to be taxed. And the charge for preparing an affidavit of debt and getting it sworn (9) — or preparing a warrant of attorney (10), even though it is never (11) executed — and the suing out a *medietate*

(1) 11 East, 286. Anon. Doug. 199. note. *Margerum v. Sandiford*, 3 Bro. 233.

(2) *Winter v. Payne*, 6 T. R. 45. *Ex parte Prichett*, 1 N. R. 266. 2 B. & P. 343. per Lord Eldon.

(3) *Luxmore v. Lethbridge*, 5 B. & A. 898.

(4) *Evans v. Bevis*, 2 Barnard, 182. *Gregg's case*, Salk. 89. contra.

(5) *Wilson v. Gutheridge*, 3 B. & C. 157.

(6) *Green v. Havel*, Say. Rep. 233.

(7) *Ex parte Williams*, 10 T. R. 496. *Clarke v. Donnan*, 3 T. R. 694. 1 Esp. 137.

(8) *Lloyd v. Muntz*, 1 Yld. 315. note.

(9) 6 T. R. 645.

(10) *Wilson v. Gutheridge*, *Sadom v. Bourne*, 3 B. & C. 15. 4 Camp. 68.

(11) *Wild v. Crawford*, 2 Str. 538.

*tatem* (1), are each of them sufficient items to enable the Court to refer the whole bill for taxation. An attorney's bill may likewise be taxed after his death, notwithstanding the amount is then due to his executor. (2)

*Taxation  
of bill.*

But a solicitor's bill of fees *wholly* made up of charges for prosecuting an appeal from the Court of Chancery in Ireland to the House of Lords, was held by the Court of Exchequer not capable of taxation — there being no criterion by which their own officer could tax the bill, or any means to which he could resort for assistance. (3) So, a charge for preparing an affidavit of the petitioning creditor's debt and bond to the Lord Chancellor, in order to obtain a commission of bankruptcy, is not a taxable item in an attorney's bill within the 2 G. 2. c. 23. s. 23., as being a charge either at law or in equity, where the affidavit has not been sworn, nor a commission issued. (4) For the same reason, a solicitor's bill in respect of business transacted in the affairs of a charitable foundation, though the office of visitor is exercised by the Lord Chancellor, is not liable to taxation; for this also is considered not a proceeding either at law or equity; as it is not in the Court of Chancery, that the visitatorial power is to be exercised. (5)

What not  
taxable.

An attorney's bill, which is not signed by him, cannot be taxed under the statute. (6) So, where a party agrees to pay a solicitor's bill on a third person, he cannot apply to have it taxed; for the statute applies only to cases between solicitor and client. (7) So, also, where the attorney makes a special agreement with his client to be paid a certain sum, at a certain rate, for his time and trouble, — it seems doubtful whether, under these circumstances, the bill can be referred to be taxed; in one case (8) of this kind the Court said they could do nothing in it; while in another (9)

) 1 N. R. 266.

) *Penon v. Johnson*, 4 Taunt.

) *Williams v. Odell*, 4 Pri. 279.

) *Burton v. Chatterton*, 3 B. &

6.

(5) *Ex parte Daun*, 9 Ves. 547.

(6) *Cas. Prec. C. P.* 60.

(7) *Langford v. Nott*, 1 Jac. & W. 291.

(8) *Anon.* 2 Barnard, 164.

(9) *Anon.* 2 Say. 521.

*Taxation  
of bill.*

Bill of an  
agent.

Mode of  
compel-  
ling an at-  
torney to  
deliver his  
bill,

and have  
it taxed.

After bill  
once taxed  
not re-tax-  
able;  
nor the  
amount  
question-  
able in a  
suit in  
equity.

it was holden, that the client should not be concluded by any agreement of this description.

The bill of an *agent* to a country attorney may be referred to be taxed, upon the country attorney bringing the amount of the whole demand into court. (1) But the application to tax it must be made by the country attorney, and not by the client. (2)

If an attorney refuse to deliver a bill signed to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney (on service thereof) do not attend, an order will be made to deliver it within a reasonable time. . If he still neglect to deliver it, the order should be made a rule of court; after duly serving which, and making affidavit of the service, the Court will, on motion, grant an attachment. When the bill is delivered, the client may then apply for a judge's order to show cause, why it should not be referred to the proper officer; upon which an order will be made, on the client's undertaking to pay the attorney what shall appear to be due to him upon such taxation. (3) But a client cannot have a summons for the delivery of the bill, and for taxing it, at the same time. (4) If the attorney do not attend the first appointment on the summons, an order will be made of course. (5)

After an attorney's bill has been once taxed by the proper officer of the court in which the business was done, it cannot be taxed a second time by the officer of any other court. (6) Nor will a court of equity entertain cognizance of a bill for an account filed by the attorney, suggesting that improper deductions were made by the officer upon the taxation, and praying that the defendants might come to a fair account with the plaintiff for the monies due to him. (7) After

(1) *Dixon v. Plant*, Doug. 199.  
n. Ex parte *Bearcroft*, *ibid.* 200.  
note. *Groome v. Symonds*, 1 Tidd.  
281. Contra, *Anon.* 2 Wils. 266.;  
and see 1 Dick. 112. 285.

(2) *Wildbore v. Bryan*, 8 Pri. 679.

(3) 1 Tidd. 318.

(4) *Cowper v. Milburn*, 1 Barnes,  
102.

(5) 4 T. R. 580.

(6) *Ashton v. Molguez*,  
1 Barnes, 95.

(7) *Osbaldeston v. Cross*, 2 Com.  
612.

the taxation of the bill, also, the client cannot have an antecedent demand on the solicitor deducted out of what was taxed due to the solicitor upon such bill; for, by applying to have the bill taxed, the party submits to pay what shall be actually found due thereon. (1)

*Taxation  
of bill.*

The delivery of a former bill by an attorney is conclusive evidence against an increase of charge in a subsequent bill, on any of the *items* contained in it, and also strong presumptive evidence against any additional *items* — unless any errors, or real omissions, can be shown in the former bill. (2)

Attorney  
bound by  
delivery of  
a former  
bill.

Where, after verdict and an injunction to stay execution, the parties finally settled the cause without the concurrence of the attorney, it was held, that he might nevertheless proceed to tax his costs, with a view of commencing an action in his own name for the amount. (3)

After a  
settlement  
by the  
parties,  
may take  
his costs.

In taxing costs between solicitor and client, it is now settled, that the solicitor can maintain no charge for drawing his bill of fees and disbursements, for he is obliged by the statute to deliver a bill to his client without any fee — nor is he allowed the charge for the attendance of a clerk in court upon the taxation, the latter being considered to attend on the private retainer of the solicitor. (4)

No charge  
for draw-  
ing his bill.

With respect to the *costs of taxation*, the 2 G. 2. c. 23. s. 23. in express terms subjects the attorney to the payment of them, if a *sixth* part of the amount of the bill is deducted by the officer on taxation; but in case less than one sixth part is taken off, the statute gives the Court a discretionary power (5) of directing those costs to be paid either by the attorney or client, according to the reasonableness or unreasonableness of the bill. In the exercise of this discretion, however, the courts are generally governed by the distinction pointed out by the statute, and make the client pay the costs of taxation, whenever less

Costs of  
taxation.

(1) Anon. 2 Ves. 452.

(3) *Brooks v. Bourne*, 1 Pri. 72.

(2) *Loveridge v. Botham*, 1 B. & P. 49.

(4) 1 Turner's Prac. 400.

(5) 2 Anstr. 491.

**Taxation  
of bill.**

than a sixth part is taken off the bill. (1) And the same even where the client advances money to the attorney to pay certain disbursements included in the bill, and the sum deducted is more than a sixth part of the amount of the bill, exclusive of those disbursements, but less than a sixth part of the gross amount. (2)

**In bank-  
ruptcy.**

The course in Bankruptcy, also, as to the taxation of a solicitor's bill, proceeds by analogy to the statute 2 G. 2. c. 23. If, therefore, upon retaxation by the Master, the bill be reduced above a *sixth*, the solicitor must pay the costs of taxation. (3)

**Where the  
attorney  
accepts a  
less sum.**

If an attorney, in satisfaction of a bill delivered, accept a less sum than what appears to be there charged, and the bill is afterwards taxed, the attorney is not liable to pay the costs of taxation, notwithstanding a sixth part is deducted from the bill delivered — unless the sum, at which the bill is taxed, is less than the sum received by the attorney in satisfaction of the bill, by one sixth of such last mentioned sum. (4) Nor is the attorney liable to the costs, where the sixth part taken off the bill arose, not by the taxation of the particular *items*, but by the *whole of certain expenses* being disallowed — on the ground that the client was *not the person liable* to those charges — and not because they were objectionable in their nature or amount. (5) But in a case before the Vice-Chancellor it was determined, that where *items* were charged in a solicitor's bill to his client, in respect of the defence of a third person at the alleged retainer of the client — and, in consequence of the solicitor failing to prove such retainer, those *items* were struck out on taxation, such *items* were to be computed among the deductions, for the purpose of determining upon whom the costs of taxation were to fall; and that, generally, when

**Where  
items  
charged to  
a party not  
liable.**

(1) *Yca v. Frere*, 14 Ves. 154. *Webb v. Stone*, 1 Anstr. 260. *Hurst v. Dixon*, 1 Barnes, 89. *Cogan v. Cave*, 1 Dick. 96. *Barker v. Bishop of London*, 2 Barnes, 147.

(2) *Hindle v. Shackleton*, 1 Taunt. 536.

(3) *Ex parte Westall*, 3 V. & B. 141. *Ex parte Inman*, Buck. 129. *Ex parte Hathorny*, 2 Mad. 319.

(4) *Ecollier v. Dutour*, 2 Barnes, 98.

(5) *White v. Milner*, 2 H. B. 357.



ever items would be properly *taxable* if the facts alleged by the attorney were true, and are deducted because he does not establish those facts, the amount is to be reckoned as a deduction in the question of costs of taxation. (1)

*Taxation  
of bill.*

But the executor or administrator of an attorney is not liable to the costs of taxation, although a sixth part of the bill for business done by the testator or intestate be deducted; for the statute imposes such costs upon the *attorney or solicitor only*; and an executor is held not to blame if he makes out the bill from the attorney's books. (2)

*Executor  
not liable.*

Where, on the taxation of a solicitor's bill, so large a sum was disallowed as to make it a matter of reprobation by the Court, the Court of Exchequer not only ordered the costs of taxation to be paid by the solicitor, but also ordered him to pay interest upon a surplus balance remaining in his hands, though it was not shewn that he had made any interest of it. The jurisdiction of the Court to make such an order was declared to be independent of the 2 G. 2. c. 23. and to be founded on the necessary and inherent control of every Court over the conduct of its own officers. (3)

*Where  
attorney  
ordered to  
pay inter-  
est, be-  
sides costs  
of tax-  
ation.*

Where the attorney is entitled to the costs of taxation, he should demand them at the time; for if he settles a subsequent account with his client without applying for them, the Court will refuse a rule to have them afterwards allowed. (4)

*Costs  
should be  
demanded  
at the  
time.*

#### SECTION IV.

##### *Of Actions and other Proceedings by and against the Solicitor.*

By the 2 G. 2. c. 23. s. 23. it is enacted, that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, &c. at law or in equity,

*Bill must  
be deliver-  
ed a month  
before  
action  
brought.*

(1) *Rigby v. Edwards*, 5 Mad.

(3) *Rex v. Bach*, 9 Pri. 349.

(2) *Weston v. Poole*, 2 Str. 1056.

(4) *Whitfield v. James*, 1 Bing.

*ulton v. Agate*, Say. Costs, 327.

*Actions  
by and  
against.*

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until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party to be charged therewith, or left for him at his dwelling-house, or last place of abode, a bill of such fees, &c. written in a common legible hand, and in the English tongue, and subscribed with the proper hand of such attorney.

*Must be  
left with  
the party.*

Before any attorney can support an action for his fees, he must not only sign and deliver, but he must also leave his bill with the party to be charged (1); for the mere delivery of it to him (if the attorney take it back again) will not be sufficient, although the party should even acknowledge the debt and promise to pay it — the intention of the statute being, that the client should have due time to examine the charges made by the attorney, and take advice upon them if necessary. (2)

*Delivery  
at count-  
ing-house  
insuffi-  
cient.*

The bill of a solicitor to a commission of bankrupt has been decided to be within the provisions of the above mentioned statute (3); and the delivery of the bill at the counting-house of the client has been held to be not a good delivery — the statute requiring that it shall either be delivered to the party personally, or left at his dwelling-house or last place of abode. (4) But where there are several assignees, it seems that the solicitor is not bound to serve each of them with a copy of his bill previous to the action; but that service upon any one will be sufficient (5), if he has acted under the commission.

*Service  
upon one  
of several  
assignees  
sufficient.*

*Bill for ob-  
taining the  
certificate.*

An attorney's bill for obtaining a bankrupt's certificate must, as in other cases, be signed and delivered a month before he can sue upon it; for the obtaining the Lord Chancellor's signature is considered as business done at court. (6) So an attorney cannot maintain an action for

*Business in  
Insolvent  
Court.*

(1) *Clarke v. Donovan*, 5 T.R. 694.

(2) *Brookes v. Mason*, 1 H. B. 390.

(3) 2 Bos 344.

(4) *Hill v. Humphreys*, 2 B. & P. 343.

(5) *Crowder v. Shee*, 1 Camp 437. *Finchell v. How*, 2 Camp 279. *Orenham v. Lemon*, 2 Dov. & R. 461.

(6) *Collins v. Nicholson*, 2 Taunt. 321. 1 Rose, 119.

business done in the Insolvent Court, without a previous delivery of his bill pursuant to the statute. (1)

But a solicitor may maintain an action against an assignee for business done under a commission of bankrupt, although the bill has not been taxed by a Master in Chancery under the fourteenth section of the new bankrupt act; for the provision contained in that section does not affect the right of an attorney against his employer, but only applies to the protection of the estate. (2) And an attorney need not be admitted a solicitor in Chancery, in order to maintain such action. (3) The assignees, however, are not liable to be joined as defendants in an action by the solicitor for the costs of issuing the commission, even though the petitioning creditor is one of the assignees. (4)

It is no defence to an action by a solicitor against an assignee, that the commission was sued out under a representation by the plaintiff, that the commission would be operative in the Isle of Man, and that it has been wholly fruitless; for the commission itself, whilst in existence, cannot be considered as a mere nullity. (5)

Where the solicitor to the commission received from the bankrupt a promissory note for his bill of costs in procuring his certificate — and the bankrupt had purchased the debts of many of the creditors — and the solicitor was indebted to the estate in such a sum, that the share of it coming to the bankrupt (standing in the place of those creditors in respect of the debts so purchased by him) would exceed the amount of the promissory note; — the solicitor was, under these circumstances, restrained by injunction, on petition, from negotiating the note. (6) So also, where a solicitor's bill was by an order in bankruptcy

*Actions  
by and  
against.*

When  
action  
may be  
brought  
though bill  
not taxed.

Assignees  
cannot be  
sued for  
costs of  
issuing  
commis-  
sion.

Commis-  
sion being  
fruitless  
does not  
prevent  
right of  
action.

Where a  
solicitor  
restrained  
by injunc-  
tion.

(1) *Smith v. Wattleworth*, 4 B. & C. 158.; and see *Ford v. Webb*, 3 B. & B. 241. Ex parte *Smith*, C. 364.

(2) *Tarn v. Heys*, 1 Star. 278. 19 Ves. 473.  
*Arrowsmith v. Barford*, 1 Star. 279. (4) 2 Camp. 276.  
note (b). *Finchett v. How*, 2 Camp. (5) *Pasmore v. Birnie*, 2 Star. 59.  
279. (6) Ex parte *Harding*, Buck, 24.

(3) *Wilkinson v. Diggell*, 1 B. & 37.

*Actions  
by and  
against.*

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referred to a Master for taxation, and after the bill was taxed, and more than a sixth taken off, the solicitor brought an action for the taxed costs, without deducting the costs of taxation, — the action was stayed on petition, and a reference was made to the Master to tax the costs of the taxation of costs, which were ordered to be deducted from the amount of the taxed costs, and the balance only to be paid to the solicitor. (1)

may support a commission upon his bill, though not previously delivered, and though pending an order for taxation of it.

Though an attorney has not delivered his bill pursuant to the statute of the 2 G. 2. c. 28. s. 22., and cannot therefore bring an action upon it, yet we have seen (2), that he may support a commission upon the amount that is owing to him; though, in such a case, the bill will be afterwards referred to the Master to be taxed, either upon the application of the bankrupt, or of any of the creditors. (3) And where a solicitor, even pending an order for the taxation of his bill, and for *staying all proceedings at law* in the meantime, sued out a commission upon it, — he was held not to be guilty of a contempt, nor was the commission supercedable; for the order was construed to extend only to bringing actions, and the common and ordinary proceedings. (4)

A solicitor, in general, not liable to the bankrupt in an action for suing out a commission.

A solicitor, who sues out a commission of bankrupt for his client, is not in general answerable to the bankrupt in an action for damages for suing it out without sufficient cause, notwithstanding he sends in the messenger to take possession of the property of the bankrupt. In a case of this nature before Macdonald C. B., he said there was no satisfactory ground for a verdict against the solicitor, who was professionally bound to act as he had done. (5)

When a petition will lie against him.

If the solicitor do not pay the commissioners' fees to them, when they are summoned to attend, they may petition against him. (6) And a petition will also lie against

(1) Ex parte *Bellott*, 4 Mad. 379.

(2) Ante, p. 91.

(3) Ex parte *Sutton*, 11 Ves. 163.

Ex parte *Steele*, 16 Ves. 166. Ex

parte *Howell*, 1 Rose, 312. Ex

parte *Prideaux*, 1 G. & J. 28.

(4) Moseley's Rep. 27. 1 E. R. L. 17.

(5) *Smith v. Gainsford*, 1 Rose, 148. (n).

(6) Ex parte *Griffith*, 2 Rose, 342. 1 Mad. 56.

a solicitor to account for property received under the commission. (1)

When a solicitor presents a petition in his own behalf in any matter of bankruptcy, the attestation required in other cases (2) is in this instance dispensed with. (3)

The Court of Common Pleas has refused to stay proceedings, or to discharge a defendant on common bail (in an action brought by an attorney for the recovery of a bill of costs); though the ground of the application was, that such action was begun before the expiration of a month after the delivering of the bill; — because, as that circumstance might have been taken advantage of, either in pleading or at the trial of the cause, the Court held it unnecessary to interfere upon motion. (4)

In the case of an action brought by the *executor* or *administrator* of an attorney, the Common Pleas have held it unnecessary, that the bill should be delivered before the commencement of the action. (5) But both that Court and the Court of King's Bench will now make a rule for referring the bill in such a case to taxation, upon the defendant entering into the usual undertaking to pay what shall be found due. (6)

Where the previous delivery of an attorney's bill is necessary to be proved at the trial to support the action, it is sufficient to give in evidence a *copy* of the bill which has been delivered to the defendant, without proof of notice to produce the original. (7) But the plaintiff cannot give *parol* evidence of the contents of the bill delivered, unless he has given notice to produce it. (8) A mistake in the date of *items* in the bill, which does not

*Actions  
by and  
against.*

As to petition by solicitor.

When action brought by attorney before the expiration of a month.

Where action brought by executor of an attorney.

Evidence necessary in support of an action by an attorney.

(1) *Saxton v. Davis*, 18 Ves. 72. C. P. 58.; and see *Hullock*, 499. 1 Rose, 79. Andr. 276.

(2) See ante, p. 840.

(3) *Ex parte Kingdon*, 1 Mad. 724.

(4) *Harper v. Leech*, 1 Barnes; 237.

(5) *Tomlinson v. Clarke*, 4 Moore, 4. (8) *Philipson v. Chase*, 2 Camp.

(6) *Penson v. Johnson*, 4 Taunt. 110.

(7) *Anderson v. May*, 2 B. & P.

(8) *Spink v. Hare*, 1 Barnes, 1453.

*Griffith v. Squire*, Cas. Pr.

*Actions  
by and  
against.*

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mislead, has been held not to vitiate the delivery of it, if regular in other respects. (1) And though the production of the writ is the usual mode of proving, that the action was not commenced till the expiration of a month from the time of such delivery, yet the *Nisi Prius* record has been also holden to be good *prima facie* evidence, that the action was properly commenced, and sufficient to satisfy (if uncontradicted) the 2 G. 2. c. 23. The defendant, however, may (if he can) contradict such evidence, by showing by a copy of the writ, that the action was really commenced before the time. (2)

Of the  
trans-  
action of  
the busi-  
ness, and  
the re-  
tainer.

After proving the delivery of his bill, the plaintiff must, also, give some general evidence that the business was done, as well as of his own *retainer* by the defendant. (3) The performance of the business may be established by the evidence of persons, who were in the plaintiff's office at the time it was done; and the plaintiff's engagement by or on the behalf of the defendant may be made out, either by direct evidence of the fact — or, as it should seem, by shewing that the defendant from time to time, or occasionally, gave directions concerning, or appeared as a party in, the proceeding. And it is a general rule, as has been before observed (4), that the reasonableness of the *items* in the bill cannot be discussed or entered upon at the trial, nor upon the execution of a writ of enquiry after a judgment by default; for, as the client has a summary method of trying the propriety of the charges by a reference to the Master, the waiver of that course is held to amount to an admission of the fairness or reasonableness of the charges, if the business were in fact done. (5) So, the negligence of the attorney cannot be set up as a defence upon the trial, however his conduct might furnish the ground of an action for negligence —

(1) *Williams v. Barber*, 4 Taunt. 806.

(2) *Webb v. Pritchett*, 1 B. & P. 265.

(3) But see 2 Barnard, 233.

(4) Ante, p. 880.

(5) *Williams v. Frith*, Doug. 198.  
*Anderson v. May*, 2 B. & P. 237.;  
and see 1 Esp. 159. *Hullock*, 500.

at least, not unless it were such a species and degree of negligence, as to deprive the defendant of all possible advantage from the proceedings constituting the charges in the bill. (1) But if the bill be not liable to taxation under the 2. Geo. 2. — as, if it should be entirely for conveyancing, the items in it will then be open to discussion and examination at *Nisi Prius*; and, consequently, the plaintiff in such a case must (besides proving the performance of the business and the retainer) shew at the trial that the charges are reasonable. (2)

*Actions  
by and  
against.*

Where some evidence is necessary of the plaintiff being an attorney — as in an action for words, for instance, spoken of the plaintiff in his profession — he need not prove this by producing his admission, or by a copy of the roll of attornies; but proof that he acted as an attorney has been held to be sufficient. (3)

*Proof of  
plaintiff  
being an  
attorney.*

But although an attorney cannot support an action upon his bill before the expiration of a month after the delivery of it, yet the omission to deliver it a month beforehand will not prevent his right of setting-off the amount in an action brought against him. He must not, however, produce it at the trial by surprise; though it is sufficient, in such a case, to deliver it time enough for the plaintiff to have it taxed before the trial. But it cannot be set off, if it has not been delivered at all. (4)

*As to at-  
torney's  
right to  
set off the  
amount of  
his bill.*

It was decided by Lord Kenyon at *Nisi Prius*, that an attorney cannot maintain an action even for the amount of money actually expended by him in respect of the common law business of his client, without a previous delivery of his bill, notwithstanding he may have agreed to take the amount only of the money expended in satisfaction of his bill. (5) But it has since been determined, where an attorney at the defendant's request put in bail for him in

*Whether  
attorney  
can reco-  
ver for  
money ac-  
tually ex-  
pended  
without  
previous  
delivery.*

(1) *Templer v. McLachlan*, 2 N. R. 186.

(2) *Hullock*, 501.

(3) *Berryman v. Wise*, 4 T. R. 366.

(4) *Martin v. Winder*, Doug. 199. (n) 1 Esp. 449. *Murphy v. Cunningham*, 1 Anstr. 198.

(5) *Miller v. Towers*, Peake, 102.

*Actions  
by and  
against.*

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Where one taxable item in a bill delivered, attorney cannot recover any part without proving a regular delivery;

even for items not connected with the profession of an attorney.

Where no bill delivered.

an action, and afterwards paid the debt and costs; and then sued the defendant for the amount so paid, without making any charge whatever for his own trouble, — that, in such a case, the attorney need not deliver a bill, to entitle him to a verdict — Lord C. J. Gibbs saying, that the statute only applied to cases, where an attorney sues to recover a compensation for his labour and skill. (1) If, however, the bill be *actually delivered*, containing some charges liable to taxation, and others not — and it appear that the delivery was not strictly conformable to the statute, the plaintiff must in that case be nonsuited; for if *one single taxable item* be found in a bill delivered, it brings the whole bill within the operation of the statute (2); and this more especially when the other items in it are for business done, in the character and in the exercise of the duties of an attorney — such as for conveyancing business, for example, in which case the plaintiff cannot split his demand, but the statute attaches upon the whole. (3) And, from what Lord Eldon says in his judgment in this case, it would seem, that if items even, *not connected* with the profession of an attorney are inserted in the bill, the plaintiff will be equally precluded from recovering upon them — on the ground, that an attorney who inserts his whole demand upon his client in a bill containing taxable items, will be taken to agree that he will not bring an action upon *any part* of such demand until the bill has been delivered a month. In one case, also, though *no bill* was delivered before the action brought, but the *whole demand* was connected with the plaintiff's character of an attorney, it was holden that the attorney's demand could not be severed (4); though in another case, where *no bill* had been delivered, Lord Kenyon admitted proof of charges for conveyancing business (5); and in one instance, where *no bill* had been previously delivered — notwithstanding

(1) *Prothero v. Thomas*, 6 Taunt. 196.

(2) *Winter v. Payne*, 6 T.R. 645.

(3) *Hill v. Humphreys*, 2 B. & P. 343.; see 1 Camp. 437.

(4) *Benton v. Garcia*, 3 Esp. 149.

(5) *Miller v. Towers*, *supra*; and see 2 B. & P. 345. per Lord Eldon.



ing the plaintiff delivered a bill of the particulars of his demand under a Judge's order subsequent to the commencement of the suit, in which were contained items liable to taxation — the plaintiff was held entitled to recover the amount of other items charged in respect of payments for the client's use, such payments not being referable to the plaintiff's business of an attorney. (1)

*Actions  
by and  
against.*

From a revision of the preceding cases, it follows, that whenever a bill is liable to be taxed under the 2 G. 2. c. 23, it must be previously delivered conformably to the provisions of that statute, in order to entitle the attorney to a right of action either for the whole, or for any part, of the amount.

*General  
result.*

There is one exception, however, to this rule — and that is, in the case of the bill of an agent to a country attorney, which, although liable to taxation (2), need not be previously delivered to found a right of action on it; for the statute of the 2 G. 2. only applies to a delivery to the proper client, and not to a delivery by an agent to an attorney. (3) Neither is such a bill within the provisions of the former statute of 3 Jac. 1. c. 7., which enacts that all attorneys and solicitors shall give a true bill unto their masters, or clients, before they shall charge their clients with any fees or charges. (4) And, in general, it will be sufficient (to enable one attorney to maintain an action against another attorney for fees without a previous delivery of his bill signed, pursuant to the exceptions contained in the 12 G. 2. c. 13. s. 6.,) that the defendant is an attorney at the time of bringing the action, although he might not have been so at the time the business was done. (5)

*An agent  
need not  
deliver his  
bill.*

Where an attorney, after an order of the Court of King's Bench for taxation of his bill and before it was taxed, brought an action upon it in the Common Pleas, the last-mentioned Court refused to stay proceedings in the action,

*Where an  
attorney  
brings an  
action  
pending*

(1) *Mowbray v. Fleming*, 11 East, 285.

2. note (a). *Nelson v. Garforth*, 1 Esp. 221.

(2) Ante, p. 884.

(5) *Ford v. Maxwell*, 2 H. B.

(3) *Bridges v. Francis*, Peake, 1. 589. 1 Esp. 420.

(4) Ibid. *Jones v. Price*, Peake,

*Actions  
by and  
against.*

order for  
taxation.

saying that they could not prevent a party from pursuing a remedy to which he was entitled by law, unless in so doing he incurred a contempt of that particular court; and that it was for the Court of *King's Bench* to enforce their own order. (1) In such a case, however, the attorney runs the risk of being committed for a contempt by the Court which makes the order for taxation. But after the *actual taxation* of the bill, there is then no objection to the attorney maintaining an action for the sum awarded by the Master, though pending an application to the Court for the costs of the taxation. (2)

Attorney  
cannot sue  
for business  
done  
entirely by  
his clerk.

Where an attorney carried on business (at a town remote from his own residence) by a clerk, whom he paid by a proportion of the profits, — it was held that he could not recover in an action for business done by such clerk for a client, who never saw or knew the attorney, nor ever had the benefit of his judgment. (3)

When an  
attorney  
recovers a  
verdict,  
Court will  
not stay  
*postea* to  
have the  
bill taxed.

After an attorney had brought an action and recovered a verdict for the amount of his bill, the Court refused to stay the *postea* in the hands of the associate, for the purpose of having the bill referred for taxation and the *postea* indorsed according to the *allocatur* — notwithstanding the jury expressly found “a verdict for the plaintiff for the amount of the bill, subject to taxation;” and the Court even discharged a rule *nisi* which had been obtained for this purpose, with costs; the practice being inflexible, that the bill cannot be taxed *after verdict*. (4)

Solicitor  
may sue in  
equity, if  
business  
was done  
in the  
same  
court.

With respect to *suits in equity* by a solicitor for his costs, it has been decided that such a suit may be entertained, if for business done in the court where it is brought; and where the business is done in another court, that a bill in equity will also lie, if the business relate to another demand, which the plaintiff makes in the court of

(1) *Stevenson v. Watson*, 1 B. & P. 365.

(2) *Hewitt v. Bellott*, 2 B. & A. 745.

(3) *Hopkinson v. Smith*, 1 Bng. 15.

(4) *Hewitt v. Fernesley*, 7 Pr. 234.; and see ante, 880.

equity. (1) In a judgment also delivered by Lord Eldon, on a bill filed by a clerk in court against a solicitor, he observed, that it did not follow because an officer of the court had a legal right, he might not also sue in his own court; and that the question depended in some degree upon the usage and inherent jurisdiction of the Court to compel its officers to do justice to each other, particularly in the matter of fees. (2) But where a bill was filed by an *executrix* of an attorney, to be paid the amount of the testator's demand for business done both as an attorney and *solicitor* for the defendant, and the bill was demurred to, — Lord Hardwicke, in this case, allowed the demurrer. (3)

*Actions  
by and  
against.*

*Aliter his  
executor.*

## SECTION V.

### *Of his Liability for Misconduct, and herein of his general Liability.*

An attorney or solicitor is liable to be punished for any misconduct in a summary way by the Court, of which he is an attorney or solicitor; — on the principle, that every Court is entitled to claim a necessary control over the conduct of its own officers. (4) If a solicitor, therefore, lends his name to a person forbid by the Lord Chancellor to take out a commission, he will be struck off the roll for that reason alone. And Lord Eldon, upon one occasion, said he would in such a case go further; and that whenever a case of that nature should be brought forward, he would direct the Attorney-General to prosecute for a conspiracy. (5) So, in a case where two solicitors were guilty

*Solicitor  
improperly  
lending his  
name, how  
punish-  
able.*

*Suing out  
a fraudu-*

(1) *Lord Ranelagh v. Thornhill*, 10 Ves. 203.

(2) *Barker v. Dacie*, 6 Ves. 681.; see the cases cited in argument, and ante, 870.

(3) *Parry v. Owen*, Ambl. 109. 10 Ves. 740.

(4) *Ex parte Prankerd*, 3 B. &

A. 257. *Ex parte Fisher*, 1 Chitt. 694. *Rex v. Bach*, 9 Pri. 349.

(5) 6 Ves. 2.; and see *In re Jackson and Wood*, 1 B. & C. 270. But an agreement by an attorney to pay a share of the profits of his business to another person who is not an attorney, is not illegal, *Candler v. Candler*, 1 Jacob, 270.

*Liability,  
&c.*

lent com-  
mission.

of gross misconduct in suing out a fraudulent commission, Lord Thurlow ordered the solicitors to be committed, and deprived one of them of his office of a Master Extraordinary in Chancery;—and further ordered, that they and other parties concerned should pay the costs, as between attorney and client. (1) And where the solicitor under a commission took upon himself likewise the several inconsistent characters of banker, commissioner, and assignee, Lord Eldon ordered that he should never be permitted to take out another commission. (2)

Applica-  
tion to  
remove  
must be  
addressed  
to the ge-  
neral juris-  
diction of  
the Court.

An application to remove a solicitor from being or acting as a Master Extraordinary of the Court of Chancery, and to strike him off the roll of such court, (though it may be properly made by reason of his conduct in a matter of bankruptcy,) should not be made *in the bankruptcy*, but should be addressed to the general jurisdiction of the Court. (3)

Solicitor  
not ame-  
nable for  
attesting  
a petition  
whilst in  
prison.

Where a solicitor attested a petition in bankruptcy whilst in prison, and it was contended that the petition was void under the statute of the 12 G. 2. c. 13. s. 9., (which makes void any process sued out in any court of law or equity by an attorney or solicitor in prison, and renders him also liable to be struck off the rolls, and incapacitated from acting as an attorney in future;)—it was held, that so highly penal an enactment must be construed strictly; and that in this case the statute did not apply; for that a petition in bankruptcy is not, strictly speaking, a proceeding either *in law or equity*. (4)

Where  
charged  
with costs  
in bank-  
ruptcy.  
False de-  
scription  
of commis-  
sioners.

In many cases the solicitor, when guilty of misconduct, will be ordered to *pay the costs* of the proceeding in which he has misconducted himself, or of the application made to the Court complaining of his conduct;—as where he obtains the docket (contrary to the general order) by a *false de-*

(1) *Ex parte Thorp*, 1 Ves. jun. 394.; and see *Ex parte Conway*, 13 Ves. 62.

(2) *Ex parte Edwards*, 6 Ves. 4.

(3) *Ex parte Lowe*, 1 G. & J. 7A.

(4) *Ex parte Thompson*, 1 G. & J. 308.

*scription of the commissioners in a country commission.* (1) *Liability, &c.*  
 So where a solicitor struck a second docket against a bankrupt, merely on the ground of a variation in the spelling of the bankrupt's name, though knowing it to be the same person, — Lord Eldon ordered the second commission to be superseded at the costs of the solicitor. (2) And where he is implicated in suing out a *concerted commission*, he will be jointly liable with the petitioning creditor and the bankrupt for the costs of superseding it. (3) In like manner, where a solicitor was employed by a bankrupt to procure his certificate, and he neglected to obtain the signatures of the commissioners, though it had long before been signed by the proper number of creditors, — he was ordered to deliver up the certificate and affidavits to the bankrupt, and to pay the costs of the application. (4) So, where the solicitor of a bankrupt presented an unnecessary petition, he was ordered to pay 40s. costs to the respondent (5); and whenever a petition is wholly unfounded, he will in that case be liable to pay the whole costs of the application. (6) Where, also, in an affidavit of service of a petition, the whole petition was recited *verbatim*, with a view to enhance the expense, Lord Hardwicke ordered the solicitor who drew it to pay the costs out of his own pocket. (7) So when he makes an affidavit in support of a petition, which contains irrelevant and scandalous matter, the Court will order it to be taken off the file, and will direct the solicitor to pay all costs as between solicitor and client. (8) If a solicitor, also, refuses to deliver up the proceedings to the assignees, and drives them to an application to the Lord Chancellor to obtain them, costs will always in such a case be given against him. (9) *Striking improperly a second docket.*  
*Concerted commission.*  
*Neglect to obtain commissioners' signatures to certificate.*  
*Presenting an unnecessary petition.*  
*Reciting petition verbatim in affidavit of service.*  
*Making a scandalous affidavit.*  
*Refusing to deliver up the proceedings.*

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|--|---|
| (1) Ex parte <i>Conway</i> , 13 Ves. 62.     | (6) Ex parte <i>Cuthbert</i> , 1 Mad. 78. 80. |
| Ex parte <i>Arrowsmith</i> , 14 Ves. 209.    |   |
| (2) Ex parte <i>Ward</i> , 1 Rose, 314.      | (7) Ex parte <i>Smith</i> , 1 Atk. 139.       |
| (3) Ex parte <i>Green</i> , 1 G. & J. 88.    | (8) Ex parte <i>Simpson</i> , 15 Ves. 476.    |
| Ex parte <i>Prosser</i> , Buck, 77.          |   |
| (4) Ex parte <i>Houghton</i> , 1 G. & J. 14. | (9) Ex parte <i>Hardy</i> , 1 Rose, 395.      |
| (5) Buck, 313.                               | Ex parte <i>Tilley</i> , 2 Rose, 83.          |

*Liability,  
&c.*

When not  
chargeable  
with costs.

In general, however, a solicitor is not chargeable with costs unless he be guilty of such an abuse as amounts to a contempt (1); and though, upon superseding a fraudulent commission of bankrupt, the solicitor was charged with costs as well as the other parties, yet he was held not chargeable with the costs of a criminal prosecution which was not under a direction in bankruptcy, and in which he was not a defendant. (2)

When  
chargeable  
with costs  
in *other*  
*proceed-*  
*ings.*

With respect to the general liability of an attorney or solicitor to pay costs in *other* proceedings at law and in equity, — it has been determined in many cases (3), that where any party to an action or suit has been obliged to pay costs, or has incurred the liability to pay them through the gross negligence, ignorance, or misbehaviour of his attorney, the Court will (upon motion) order the attorney, in the one case, to pay the costs instead of his client — and in the other case, to reimburse the client the cost which he has paid.

But besides this summary liability as to costs, an attorney is also liable to his client in an *action for damages*, for any loss or injury sustained for his misconduct. Thus, where a party is nonsuited in an action, from the cause being called on without the attorney ascertaining whether or not a material witness for the plaintiff had arrived, he is answerable to the party in an action upon the case for damages. (4) So, if he pays into his own bankers the money

(1) *Ex parte Heywood*, 13 Ves. 67. Say. 311. 2 Bl. 954. *Falmer v. Hawkins*, 2 Barnes, 536. *Arden v. Marsden*, 10 East, 257.; 21 E. Hullock, 485. et seq. where some of the authorities are collected.

(2) *Ex parte Arrowsmith*, 14 Ves. 209.

(3) 1 P. Wms. 593. *Fowke v. Horabin*, 2 Barnes, 3. *White v. Washington*, 1 Barnes, 302. *Arden v. Lamley*, 1 Barnes, 177. *Lamb v. Goodenough*, 2 Barnes, 290. *Macdonald v. Gunter*, 1 Barnes, 242. *Cave v. Aaron*, 3 Wils. 33. 1 Bl. 376. *Ferguson v. Mackreth*, 4 T. R. 371. n. (b). *Atkinson v. Burton*, 202.

(4) *Reece v. Rigby*, 4 B. & L. 202.

of his client, mixing it with his own, and the bankers become bankrupt, the attorney is in this case liable to make good the loss to his client. (1) In like manner, where an attorney lends his clients money upon security, which eventually fails through his negligence, he is liable to make good the loss; — and this in one case, where there was even an acquiescence in the loss for twenty-five years, and a settlement and discharge of his account, the attorney having concealed from the client the real state of the transaction, and having omitted to communicate the insolvent state of the parties with whom he had dealt on his client's behalf. (2) So, also, where an attorney (who was employed by a vendee to inspect the title to an estate) omitted to lay before counsel for his opinion a *supplementary* abstract of the vendor's title, (which was delivered to him by the vendor's solicitor after the principal abstract — and which second abstract would have induced the counsel to give an opinion against the title, instead of in favor of it) — by which neglect the vendee was obliged to pay a sum of money to a devisee in remainder of the estate, in order to confirm his own title to it, after the execution of the conveyance from the vendor; — the attorney, under these circumstances, was held liable to an action by the vendee for damages occasioned by his negligence. (3) But there must be either *crassa negligentia*, or *lata culpa*, in the conduct of an attorney, to render him liable to an action for damages. Therefore a mere mistake in a point of practice will not subject him to such an action, and more especially where the point is doubtful, and the meaning of the rule of Court, on which it is founded, is obscure. (4)

*Liability,  
&c.*

When  
liable to  
action for  
damages.

When not  
liable.

Where a penal action was brought against a defendant, on the 2 G. 2. c. 23., for acting as a solicitor *in the Court of* Fatal variance in a penal

(1) *Robinson v. Ward*, 1 Ryan & M. 274.

(2) *Macdonald v. Macdonald*, 1 Bligh, 315.

(3) *Ireson v. Pearman*, 3 B. & C. 799.

(4) *Laidler v. Elliott*, 3 B. & C. 738.; and see *Pitt v. Yalden*, 4 Burr.

2060. *Baikie v. Chandless*, 3 Camp. 17. *Russell v. Palmer*, 2 Wils.

325.

*Liability,  
&c.*

action  
against an  
attorney.

Attorney  
may make  
himself  
personally  
liable.

*Chancery*, viz. in the matter of *T. S.*, a bankrupt, the defendant not being a solicitor of the said court:—and the proof adduced was, that the defendant had been consulted, and was instrumental in the matter of a petition in *Bankruptcy* to the Lord Chancellor by the creditors of *T. S.*;—the plaintiff was nonsuited, on the ground that proceedings in *Bankruptcy* are not proceedings in *Chancery*. (1)

An attorney may also make himself personally liable from his own undertaking — or from dealing with a party in the nature of a principal, so as to induce such party to give him credit instead of his employer, though the business (at the time of its being transacted) is known to be for the benefit of his employer; and the question in such a case, to whom the credit is given, is a proper question for the jury to determine. (2) So, where the solicitors of the assignees of a bankrupt, whose lands were distrained for rent, gave the following written undertaking: “ We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained,” — it was held, that the solicitors rendered themselves personally liable for the rent. (3) Where also the attornies for the plaintiff and defendant (in a cause which was ready for trial) entered into an agreement, whereby they *personally* undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a particular manner, — it was held in this case, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified (4), and was liable to an action for them. An attorney is bound, also, by the declaration or admission made by his clerk, in the course of any business which the latter is authorized to transact, in the same way as

(1) *Ford v. Webb*, 3 B. & B. 241.

(2) *Scrace v. Whittington*, 2 B. & C. 11.; and see *Foster v. Blake-lock*, 5 B. & C. 328.

(3) *Burrell v. Jones*, 3 B. & A.

(4) *Iveson v. Channington*, 1 B. & C. 160.



every principal is bound for the acts of an accredited and authorized agent. Therefore, where the clerk, in attending the taxation of costs in an action for his employer (the attorney in the cause), declared, that his master had conducted the suit from motives of charity, and would not charge extra costs, — it was held, that the attorney in this case was bound by such declaration, in an action subsequently brought against him to recover the amount of damages, which had been received by him in the former action. (1)

*Liability,*  
*&c.*  
\_\_\_\_\_

(1) *Ashbourn v. Price*, 1 Dow. & R. 48.



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## ADDENDA.

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**PAGE 13.** Add to Note (2)—“ or to order the messenger Jurisdiction.  
(who had possessed himself of property of a bankrupt under a commission which was superseded) to account for the same to assignees under a subsequent subsisting commission. Ex parte *Shaw*, 2 G. & J. 73.”

Ibid. Note (4)—“ Where, however, a petition by an assignee under a second commission prayed, that the petitioning creditor under a prior commission (who had received a sum of money from the bankrupt, on condition of not proceeding with such commission, and had accordingly abandoned it,) might refund the money so received, the Vice-Chancellor dismissed the petition with costs, on the ground that the Court had not jurisdiction. Ex parte *Marshall*, 2 G. & J. 53.”

**Page 17.** Note (1) — “ But upon a similar application, where the acceptor had accepted the bills for *the accommodation of the drawer*, Lord Eldon decided, that he had in this case jurisdiction to entertain the application; and that the relief, which the drawer was entitled to, was not to be defeated by his joining the acceptor in the application. Ex parte *Hippins*, 2 G. & J. 93.”

**Page 56.** Add to Note (5)—“ or a denial to *one person* Denial.  
calling to make inquiries about a dishonoured bill of exchange, whom the bankrupt considered a creditor. *Bleasby v. Crossley*, 2 Carring. & P. 213.”

**Page 92.** Note (7) — “ And it has lately been held by the Vice-Chancellor, that a creditor, whose debt had been Petitioning creditor's debt.

*Omitted* in the schedule filed by the insolvent, might maintain a commission founded on that debt. *Ex parte Shuttleworth*, 2 G. & J. 68."

Petitioning creditor's debt.

Page 94. Add to Section I. — "But the creditor, who makes the application, must first go before the commissioners, to have the debt of the petitioning creditor expunged. *Ex parte Chappell*, 2 G. & J. 131."

Statute of limitations.

Page 99. Note (2) — "It appeared, however, upon the last argument of this case, that the different writs (relied on to save the statute of limitations) had not been returned and filed, nor the continuances entered on the roll, until after the issuing of the commission. 5 B. & C. 341."

Docket.

Page 108. Note (6) — "But this is not the case, when an order has been obtained to amend the commission upon bringing in new docket papers, notwithstanding they are not brought in before the application for the second docket. *Ex parte Harman*, 2 G. & J. 25."

Affidavit.

Page 109. Note (6) — "It is, also, no objection to the affidavit, that it is sworn before the solicitor suing out the commission. *Re Sir William Elford*, 2 G. & J. 65.; *Re Whittle*, ib. note (a).

Amendment.

Page 120. Note (2) — "But in a recent case, when the name of one of the commissioners was spelt wrong, Lord Eldon permitted the mistake to be amended, though the commission had been opened, and the bankruptcy declared; but he ordered the other commissioners to proceed to a new adjudication. *Re Barber*, 2 G. & J. 81."

Joint commission.

Page 133. Add to Section 4. — "And when a separate commission is issued against one partner after a joint commission against the other partners, the commissioners must proceed under the several commissions as they are brought before them; since it is impossible for them to know beforehand which, in the result, will be available. *Ex parte Price*, 2 G. & J. 161."

Country commission.

Page 147. Note (7) — "And Lord Eldon lately said, he would make an order, that no attorney should in future sue out a country commission, without certifying that no

clerk of his was inserted as one of the commissioners. *Ex parte Bourne*, Sittings after Trinity Term, 1826."

Page 174. Note (1) — "But the assignees are not answerable to the messenger for costs due *before* the choice of assignees. *Burwood v. Felton*, 3 B. & C. 43."

Page 329. Note (3) — Add the like.

Page 177. Note (2) — "But the statute of limitations Statute of  
limit-  
ations. does not run against a creditor after the issuing of the commission. *Ex parte Ross*, 2 G. & J. 46."

Page 180. Note (1) — "In one case, where the obligor Proof. of a bond (pledged with the creditor) had left the country, and the eventual payment of it was very uncertain, the Vice-Chancellor ordered that the creditor might prove his whole debt, and take such proceedings as he might be advised to compel payment of the bond, accounting to the assignees for any surplus recovered on the bond, if with the dividends received under the commission it should exceed the amount of the debt. *Ex parte Smith*, 2 G. & J. 106."

Page 204. Add to Note (1) — "*Hockley v. Bantock*, 1 Russ. 141."

Page 207. Note (4) — "But where an equitable mort- Equitable  
mortgage. gagee advanced a further sum, and took a warrant of attorney to secure that sum — and the bankrupt afterwards executed to him a conveyance in trust to sell — and after payment of the first sum advanced, to pay the surplus to the bankrupt — and on the day of the date of the conveyance judgment was entered up, and execution levied under the warrant of attorney for the last sum, part of which was satisfied by the levy; — it was held, that the mortgagee was not entitled to tack the residue of the judgment debt to the mortgage. *Ex parte Pettit*, 2 G. & J. 47."

Page 222. Add to Note (3) — "*Ex parte Saunders*, 2 G. & J. 132."

Page 233. Add to last sentence — "And though the Appren-  
tices. execution of the indentures has not taken place from mere inattention, yet if the agreement for the apprenticeship is

concluded, and the apprentice is actually serving under the concluded agreement, the father will be entitled to a return of part of the premium. Ex parte *Haynes*, 2 G. & J. 122."

Promissory note.

Page 242. Note (2) — "Upon the same principle, a promissory note payable with interest twelve months after notice is proveable, though the maker becomes bankrupt before any notice is given. *Clayton v. Gosling*, 5 B. & C. 360. Ex parte *Elgar*, 2 G. & J. 2. contra. Ex parte *Downman*, 2 G. & J. 85."

Page 259. Note (2) — "And where part of the account between two bankrupt houses consisted of bills that might be proved against both estates, Lord Eldon held, that there could be no proof in respect of those bills as between the two houses, unless there was a surplus after satisfying the holders of the bills. Ex parte *Rawson*, Ex parte *Lloyd*, 1 Jacob, 274."

Interest.

Page 272. Note (1) — "The interest is in such case to be calculated on the whole debt up to the first dividend; then upon the principal money unpaid, after deducting the amount of the dividend up to the second dividend, and so on. Re *Higginbottom*, 2 G. & J. 123."

Page 278. At end of first paragraph add Note — "*Holding v. Impey*, 1 Bing. 189. 7 Moore, 614."

Page 295. Add to Note (2) — "Ex parte *Houston*, 2 G. & J. 36."

Assignees.

Page 326. Note (4) — "Thus, where B. (one of two assignees) signed the cheques for the dividends, and delivered them to S., his co-assignee, who undertook to distribute them to the creditors, and the money was fraudulently received on some of them by a clerk of S., and S. became a bankrupt before the actual demand of the dividends, — it was held, that B. was not liable for this loss; as the credit of S. was not impeached at the time of the delivery of the cheques to him, and as such delivery was in the proper execution of B.'s duty as one of the assignees. Ex parte *Griffin*, 2 G. & J. 114."

Page 327. Add to first paragraph — "And the Court



will not review the allowance by the commissioners of the accounts of the assignees, except in matter of principle. *Ex parte Anthony*, 2 G. & J. 55."

Page 344. Note (3) — "But where the bankrupt shows that there will be a clear surplus of his estate, this does not seem to be necessary. *Ex parte Archer*, 2 G. & J. 110."

Pages 345. 732. Note (3) — "But where assignees are removed by order of the Lord Chancellor, the new assignee may sue in his own name, without stating in the declaration either the fact of their removal, or his own appointment, notwithstanding the cause of action accrued in the time of the former assignees. *Aldritt v. Kittridge*, 8 Moore, 372."

Page 354. Add to Section I. — "Where the bankrupt wilfully retained possession of a cottage and land, which had passed to the assignees by the bargain and sale, the Vice-Chancellor made an order upon him to deliver up possession within fourteen days after personal service of the order. *Ex parte Hargraves*, 2 G. & J. 59." Real estate.

Page 371. Note (1) — "Where an attendant term became vested in the wife of the bankrupt (who was the owner of the inheritance) as the administratrix of the trustee, after which the bankrupt died, — it was held, that the wife was not entitled to dower, and that she was bound to assign the term to a purchaser, to whom the assignees had sold the estate; for, as she would not have a right to dower if the term were vested in another person, the mere circumstance of its being vested in her will not give her that right. *Mole v. Smith*, 1 Jacob, 490." Dower.

Page 391. Note (2) — "And where a lessee under a lease (containing a covenant not to assign) conveyed all his estate and effects to trustees for the benefit of his creditors, it was held, that, as this conveyance was void under the bankrupt law, it did not amount to a forfeiture of the lease. *Doe v. Powell*, 5 B. & C. 308." Lease.

Page 397. Note (5) — "The Court has no power upon such an application to make the assignees pay the costs, or

to give the lessor the costs of the application out of the bankrupt's estate. *Ex parte Bright*, 2 G. & J. 79."

Page 444. Note (2) — The author has been given to understand, that the report of this case is somewhat inaccurate, and that the learned Chief Justice did not go to the extent of saying, that the belief of the mere *probability* of bankruptcy would invalidate a payment made by the bankrupt, as being a payment in contemplation of bankruptcy.

Delivery  
of goods.

Page 474. Note (2) — "A delivery order for wine lying in the London Docks, given by the vendor to the vendee, without any thing else being done, is not a sufficient acceptance of the wine to take the case out of the statute of frauds. *Bentall v. Burn*, 1 Ry. & M. 107."

Page 478. Add to Note (1) — "*Wallace v. Woodget*, 1 Ry. & M. 193."

Lien of  
vendor.

Page 489. Note (3) — "But where a vendee (under a contract to pay for goods on delivery) obtained possession of them by giving a cheque, which he had *no reasonable ground to expect would be paid*, and then became bankrupt, it was held that his assignees gained no property in the goods. *Hawse v. Crowe*, 1 Ry. & M. 414."

Bankrupt.

Page 536. A bankrupt cannot apply to be discharged under the Lords' Act before he passes his last examination: and then he must insert in his schedule an assignment to the plaintiff of all his estate, &c. subject to the commission and the payment or satisfaction of his debts under it. *Nunney v. Hall*, 8 Moore, 428."

Page 555. Note (1) — "Where one of a bankrupt's assignees had received money as a trustee under a trust deed, prior to the commission, which he had not accounted for — and the bankrupt showed that there would be a clear surplus of his effects, — he was allowed (on petition) to sue that assignee in the name of the other assignee; and the former was restrained from setting up his character of assignee, to defeat the action. *Ex parte Archer*, 2 G. & J. 110."

Page 607. Note (1) add — “ *Shallcross v. Dysart*, 2 G. & J. 87.”

Page 613. After last paragraph add — “ But a certificate under a commission, which issued *before* the 1st Sept. 1825, (when the new act began to take effect,) need not be registered, though the certificate itself was not obtained until after that day. *Tattle v. Greenwood*, 3 Bing. 493.” Certificate.

Page 639. Note (1) — “ But a retiring partner is still liable to a creditor of the old firm, though the creditor assent to the transfer of his debt to his credit by the new firm. *David v. Ellice*, 5 B. & C. 196.” Partners.

*Ibid.* Note (2) — “ Nor where the retiring partner agrees, that certain articles of the stock shall become the exclusive property of the other partner, and that a certain fund shall be appropriated to the payment of the debt, which afterwards proves deficient, has he any lien on such articles for the deficiency. *Lingen v. Simpson*, 4 Sim. & St. 600.”

Page 658. Note (1) — “ If, however, a joint creditor has a separate security from one of his co-debtors, he may prove his debt against the joint estate, without the surrender or sale of his security. *Ex parte Peacock*, 2 G. & J. 27. *Ex parte Roding*, *ibid.*”

Page 672. Note (3) — “ And see *Ex parte Castell*, 2 G. & J. 124. *Ex parte Stroud*, *ibid.* 127.”

Page 677. Note (3) — “ But where a trader gave to her creditor an order on the executor of her debtor, to pay the debt to the creditor — and the executor (having received the order) retained it until the assets of the testator should enable him to pay simple contract debts — and the trader became bankrupt before payment, — the creditor was declared entitled to receive the amount of the order from the executor, notwithstanding a subsequent arrest of the trader. *Ex parte Smith*, 2 Swanst. 392.” Payments.

Page 698. After the second paragraph, add — “ The Court of King's Bench refused to set aside an execution Executions.

issued upon a judgment of *nil dicit* under a warrant of attorney, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, — holding, that the statute 6 G. 4. c. 16. s. 108. did not render the execution in such case void, but merely declared that he should not avail himself of it to the prejudice of other fair creditors. And Mr. Justice Holroyd said, he entertained considerable doubt, whether the question upon this enactment could be determined in a court of law. *Taylor v. Taylor*, 5 B. & C. 392.”

But where an indenture (which was in legal effect a *cognovit actionem* within the meaning of the 3 G. 4. c. 58) had not been filed with the proper officer within twenty-one days after its execution, pursuant to the requisition of that statute, and judgment was not entered up until after the expiration of the twenty-one days; it was ordered on an application by the assignees of the party against whom judgment had been so entered up, that an execution issued on such judgment should be withdrawn. *Hurst v. Jennings*, 5 B. & C. 650.”

**Set-off.** Pages 724. 861. Note (3) — “The costs of a judgment as in case of a nonsuit, entered up against the plaintiff after he has become bankrupt, cannot be set off against the costs of an action by the assignees against the defendant in the former action. *West v. Pryce*, 2 Bing. 455.”

**Sheriff.** Page 750. Note (1) — “Where the sheriff, having paid over the proceeds of goods taken under a *f. fa.* against a bankrupt, was sued in trover by the assignees, and gave notice to the creditor to defend the action — and (upon his refusal) let judgment go by default, and paid over the value of the goods to the assignees; — it was held, that the sheriff was not bound to defend the action, but might recover against the creditor the money paid to him, upon proving the validity of the bankruptcy. *Austen v. Ward*, 1 Ry. & M. 116.”

**Evidence.** Page 779. Add to Note (3) — “And so, where the deposition omits to state, that the party absented himself

with an intent to delay his creditors. *Toleman v. Jones*, 9 Moore, 24."

Page 787. After first paragraph add, — "Parol evidence is admissible to prove matters deposed by a party on his examination before the commissioners, if material to the inquiry, though they are not contained in the written examination. *Rowland v. Ashby*, 1 Ry. & M. 281."

Page 806. Note (4) — "But the Court will not suspend the advertisement, unless upon the proceedings there appears a clear defect in the requisites to support the commission. *Ex parte Ainsworth*, 2 G. & J. 89." Superse-  
deas.

Page 816. Note (5) — "And in another case the Vice-Chancellor, upon a petition presented by the bankrupt within the forty-two days, superseded the commission without a previous surrender of the bankrupt, on the ground of the insufficiency of the petitioning creditor's debt, — saying, that the bankrupt was not bound to surrender before the last public meeting. *Ex parte Nicholls*, 2 G. & J. 101."

Page 813. Note (4) — "And where all the commissioners but one were dead, and one of the creditors was also dead intestate, without being administered to, but whose son was ready to consent, Lord Eldon allowed the surviving commissioner to certify the consent of the creditors, and the son of the deceased creditor to sign a consent to the *superse-  
deas*. *Ex parte Wallis*, 2 G. & J. 25. In one case, also, where the bankrupt was abroad, and had avowed his intention of not returning to England, Lord Eldon dispensed with the bankrupt's previous surrender, and allowed his solicitors to sign the petition for the supersedeas. *Ex parte Carling*, 2 G. & J. 35."

Page 818. Note (7) add — "Nor if he be described as he described himself in carrying on his trade, and according to the popular description of his residence, notwithstanding it is not the strict legal description. *Ex parte Wride*, 2 G. & J. 99."

Page 832. Note (4) — "And the Lord Chancellor also retains his power over the proceedings under the commis-

sion; which he sometimes orders to be deposited in the Bankrupt Office for the purpose of safe custody. *Ex parte Shaw*, 1 Jac. 270."

**Petition.** Page 839. Note (5) — "And in a subsequent case His Honour still retained the same opinion. *Ex parte Dumbell*, 2 G. & J. 121."

Page 840. Note (6) — "When a petition is permitted to stand over, it is upon condition of the petitioner paying the costs of the day. It is not necessary, that the order for these costs should be drawn up, but there must be an affidavit of the demand having been made of them, before the non-payment of them can be urged as a preliminary objection to the subsequent hearing of the petition. *Ex parte Leach*, 2 G. & J. 78."

**Affidavit.** Page 842. Note (11) — "It is no objection to an affidavit, that it was not entitled in the matter of the bankruptcy, if from the accompanying circumstances it is manifest, that it was judicially used in the bankruptcy. *Ex parte Simonds*, 2 G. & J. 44."

**Costs.** Page 846. Note (3) — "So, where the bill had been taxed at 97*l.* 10*s.*, and the commissioners had excluded the parties from attending the taxation. *Ex parte Palmer*, 2 G. & J. 34."

Page 847. Add to first paragraph of Section 2. — "And the commissioners ought to tax such costs from time to time as they occur, and not wait until the whole business of the commission is concluded. *Ex parte Gore*, 2 G. & J. 117."

Page 848. End of first sentence refer as an authority to — " *Ex parte Leathwaite*, 16 Ves. 424."

Page 867. Note (2) — "But though there is no suit pending, an attorney cannot take a mortgage from his client for securing future costs. *Jones v. Tripp*, 1 Jacob, 323."

Page 868. Note (4) add — "1 Jacob, 270. S. C."

**Solicitor.** Page 869. Note (5) — "So, the solicitor of a purchaser of an estate from the bankrupt is bound to attend the commissioners, for the purpose of being examined, but

without prejudice to any question of privilege. *Ex parte Hodgson*, 2 G. & J. 21."

Page 871. Note (4) add — "*Ex parte Burwood*, 2 G. & J. 70."

*Ibid.* Note (5) — "A clerk to a solicitor, commencing practice for himself, is not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master. *Bricheno v. Thorp*, 1 Jacob, 300."

Page 878. Note (8) — "Where a commission was superseded by an arrangement between the bankrupt and his creditors, and the bankrupt pays the solicitor's bill without taxation, the Court will afterwards order it to be taxed. *Ex parte Heyden*, 2 G. & J. 52."

Page 881. Note (7) — "Neither can it be made one of the terms of the compromise of a suit, that the solicitor's bill shall be paid without taxation. *Batme v. Paver*, 1 Jacob, 307."

END OF THE FIRST VOLUME.

## ERRATA.

- Page 45. In marginal abstract, for "necessary" read "sufficient."
63. Note (4), for "Roke, 168." read "Peake, 168."
156. Note (1) line 3., for "118." read "150."
222. Note (3), for "77." read "79."
365. Line 1., for "380." read "489."
- Note (1), for "Picklock v. Lyster, 2 M. & S." read "Pickstock v. Lyster, 3 M. & S."
425. Note (1), for "Doug. 303." read "Doug. 317."
441. Note (5), for "5 Mod." read "5 Mad."
489. Line 8. from bottom, for "Ch. 22." read "Ch. 23."
557. Note (5), for "89." read "59."
586. Line 10., for "commission" read "certificate."
608. Marginal abstract at bottom, dele "discharged."
663. Note (1), for "566." read "656."
677. Note (3), for "128" read "123."
783. Note (3), for "Walker v. Barnell, Doug. 303." read "Walker v. Burnell, Doug. 317."
790. Note (3), for "Boden v. Dallow, 1 Atk. 280. ante, 728." read "Boden v. Dellow, 1 Atk. 289. ante, 729."
872. Note (1), last line, for "285." read "429."







